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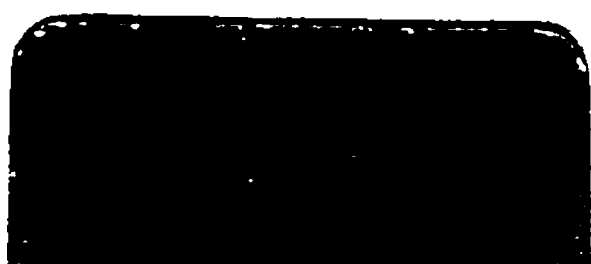
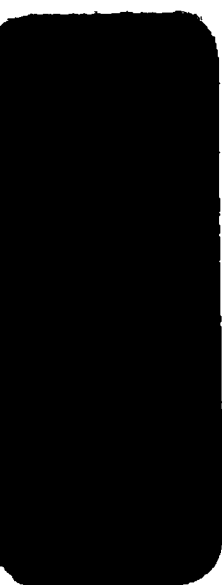
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PRACTICAL TREATISE
ON
The Law of Evidence,
AND
DIGEST OF PROOFS,
IN
Civil and Criminal Proceedings.

By THOMAS STARKIE, Esq.
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CAMBRIDGE.

WITH REFERENCES TO AMERICAN DECISIONS,
By THERON METCALF.

VOLUME II.

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DISTRICT OF MASSACHUSETTS TO WIT:

District Clerk's Office.

BE it remembered, that on the fifth day of January, in the year of our Lord one thousand eight hundred and twenty-six, and in the fiftieth year of the Independence of the United States of America, Wells and Lilly of said district have deposited in this office the title of a book, the right whereof they claim as Proprietors in the words following, to wit—

A Practical Treatise on the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings. By Thomas Starkie, Esq., of the Inner Temple, Barrister at Law; Downing Professor of Common Law in the University of Cambridge. With References to American Decisions, by Theron Metcalf.

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Clerk of the District of Massachusetts.

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Law of Evidence.

PART IV.

IN pursuance of the arrangement originally announced (a), the evidence applicable to the proof of particular issues and facts, and also of such other matters as relate to the subject of evidence, and which have not been already discussed, will be considered in alphabetical order. It is proper to premise, that for the sake of facility of access, such a distribution will be adopted as practical convenience may suggest, according to the particular subject-matter. The proofs peculiar to the different forms of action will be classed under the several forms, according to their appropriate titles, as Assumpsit, Trespass, Trover. The proof peculiar to the proceedings by and against particular persons will be considered separately under their respective titles, such as Sheriffs, Magistrates. &c. So also the proofs which are peculiar to some particular instruments, such as Bills of Exchange, Deeds, &c. will be distinctly enumerated.

PART
IV.

* ABATEMENT.

* 2

ON issue taken on a plea in abatement, it usually lies upon the defendant to prove the truth of his plea. Upon a plea in abatement for the non-joinder of a joint-contractor, if the replication merely deny the defendant's plea, the *onus* of proof is incumbent on the defendant. In such case it seems, that in principle, the defendant ought to begin, for the question as to the quantum of damage

(a) Part I. sec. v.

PART
IV.

* 3

Plea of non-
joinder.

does not arise until the issue has been decided (a) ; but the practice on this point has not been uniform (b). If the replication allege that the promise * was made by the defendant alone, the issue seems to be on the plaintiff (c).

A plea in abatement, that the defendant made the promise jointly with another, is supported by evidence that the defendant made the promise jointly with an infant, for the plaintiff ought to plead and prove that the infant has avoided his promise (d). (1) Upon a plea that A. and B., assignees of C., a bankrupt, ought to have been joined, it is not sufficient for the defendant to prove that they have acted as assignees ; he must prove that they were so, either by the production of the assignment, or by proving an admission by the plaintiff to that effect (e). A bill delivered by the plaintiff for business done for the insured, the defendant being one, in which he debits the defendant with three-sevenths only of the whole amount, is *prima facie* evidence ; (the defendant having pleaded in abatement) that the action was brought to recover his share only (f).

(a) *Supra*, Part III. p. 385. *Jackson v. Hesketh*, 2 Starkie's C. 518. *Hodges v. Holder*, 3 Camp. 366.

(b) In *Roby v. Howard*, 2 Starkie's C. 555, Abbott, C. J. held that the plaintiff ought to begin. So in *Stanfield v. Levy*, 3 Starkie's C. 8. But in the latter case, the plaintiff having proved the amount of his demand was allowed to reserve his evidence in answer to the plea, until the evidence in support of it had been adduced on the other side. In the subsequent case of *Lacon v. Higgins*, 3 Starkie's C. 178, his Lordship intimated, that if the plaintiff elected to begin he ought to go into the whole of the case ; but there the defendant's counsel began, having admitted the amount of the debt claimed. Bayley, J. at the York Summer Assizes, 1821, directed that the defendant should begin, and that the question of damages should, if necessary, be tried afterwards. See *Young v. Bairner*, 1 Esp. C. 103. The plaintiff may, on motion, compel the defendant to give him a particular of the places of residence of the alleged co-partners. *Taylor v. Harris*, 4 B. & A. 93. The plaintiff will fail, if it appear that any other than those named in the plea jointly promised. *Godson v. Good*, 6 Taunt. 587.

(c) See *Young v. Bairner*, 1 Esp. C. 103, where the replication was that the defendant undertook *solely* to pay, and the plaintiff began.

(d) *Gibbs v. Merrill*, 3 Taunt. 307.

(e) *Pasmore v. Bouzfield*, 1 Starkie's C. 296. See also *Hudson v. Robinson*, 4 M. & S. 475.

(f) 1 Starkie's C. 296.

(1) [See *Burgess v. Merrill*, 4 Taunt. 468. *Hartness & al. v. Thompson & al.* 5 Johns. 160. *Woodward v. Newhall & al.* 1 Pick. 500.]

If the plaintiff contract with the defendant *alone*, without knowing that he has other partners, it seems that proof by the defendant, upon a plea in abatement for non-joinder, that he had secret partners, would not be a sufficient defence in support of the plea (*g*).

PART
IV.

The plaintiff must be prepared to prove his damages.

Damages.

Where a peer is named as a commoner, he may plead the misnomer in abatement, since the title is part of * his name, and he ought to be tried by his peers (*h*); but he ought to set forth the writ, &c. upon the plea, because it is but a dilatory plea, and must be tried not by the country but by the record. But a plea that the defendant is a peeress by marriage must be tried by the country, since it involves a question of fact extrinsic of the record (*i*).

* 4

Misnomer.

Upon a plea of peerage under letters patent, they must be produced under the great seal (*k*). In Knowles's case, upon an indictment for murder, the defendant pleaded that his grandfather was created Earl of Banbury by letters patent under the great seal of England, which he produced in court; the Attorney General replied, that on, &c. the defendant petitioned the Lords in Parliament to be tried by his peers, and that the Lords disallowed his claim; the defendant demurred, and the demurrer was allowed, on the ground that the refusal of the Lords could not operate as a judgment (*l*).

If the defendant in a criminal proceeding plead a misnomer, the King may reply that he is known by the one name as well as the other (*m*); but in an appeal such a replication was not allowed (*n*).

Upon a plea of *misnomer*, where the defendant avers that

(*g*) *Doo v. Chippenden*, Cor. Kenyon, Ch. J. at Westmr. sittings after Hil. T. 1790, upon a plea in abatement cited in Mr. Abbott's treatise, 92. *Baldney v. Ritchie*, 1 Starkie's C. 338; but see *Dubois v. Ludert*, 1 Marshall, 246. See tit. *Partnership*, *infra*. Where churchwardens were sued for money paid for repairs, it was held, upon a plea in abatement, that it was unnecessary to join vestrymen who signed the resolution for repairs without any intention of becoming responsible, the churchwardens having jointly given the orders, *Lanchester v. Fisher*, 1 Bing. 201.

(*h*) i. e. In case of Treason or Felony, 2 Hale, 240. 6 Co. 53. *Countess of Rutland's case*, 35 H. 6, 46.

(*i*) 6 Co. 53. 2 Hale, 240. See Starkie's Crim. Pl. 295.

(*k*) 2 Salk. 509. [4 Hallam's Middle Ages, (1st Amer. ed.) 25 note.]

(*l*) *R. v. Graham*, 4 St. Tr. 410.

(*m*) 2 Hale, 238.

(*n*) 1 H. 7. 29. 21 Ed. 3. 47. 2 Hale, 238.

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IV.

- * 5 he was *baptized* by the name of *A. B.*, he must give proof of such baptism, although he was not bound so to allege it; and it is not sufficient to show that he has always been called and known by that name (*o*). A defendant in either a criminal or civil * proceeding will in general be concluded in a new action, or upon a fresh indictment, as to the name or addition which he has set forth in his former plea (*p*).

Competency,

- If in *assumpsit* the defendant plead in abatement that the promise was made jointly with *E. F.*, the latter will be a competent witness for the plaintiff; for if the plaintiff were to succeed, although the record would prevent the plaintiff from recovering a second time in a joint action, the witness would still be liable to an action at the suit of the defendant for contribution (*q*); for the record would not be evidence against the latter; and if the plaintiff were to fail, the witness, if a partner, would still be liable to be sued by the plaintiff in an action against himself and the former defendant, and would be ultimately liable to pay his own share. The witness, if he be a partner, is at all events liable to pay his own proportion of the debt (*r*). It seems, however, that *E. F.* would not have been a competent witness for the defendant, in order to prove that he was a joint contractor, without a release (*s*), where he would be liable to contribute towards the costs of the action in case the defendant failed. But a release from the defendant would at all events make him competent, for then he would not be liable to contribution; and it would be his interest that the plaintiff should recover against the defendant alone, * 6 rather than that * he should fail, in which case he might still bring a joint action.

(*o*) *Weleker v. Le Pelletier*, 1 Camp. 479. See Com. Dig. *Abatement*, F. 17. *Holman v. Walden*, 1 Salk. 6. [See Willes, 558.]

(*p*) 2 Hale, 248. See Stark. Crim. Pleadings, 2d Ed. 313.

(*q*) Lord Ellenborough seems to have been of opinion that in this event the witness would have been in a worse situation than he would have been in had the plaintiff failed, on account of his liability to contribute towards the costs of the former suit.

(*r*) *Hudson v. Robinson*, 4 M. & S. 475. And see *Cossham v. Goldney*, 2 Starkie's C. 414. But a joint contractor who has let judgment go by default is not a competent witness for the plaintiff, for he would thereby entitle himself to contribution; *Brown v. Brown*, 4 Taunt. 752; *Mant v. Mainwaring*, 2 Moore, 9. See post p. 1063.

(*s*) *Young v. Bairner*, 1 Esp. C. 103; and see the observations of Lord Ellenborough, 4 M. & S. 480, and of Bayley, J. ib. 484; and see *Goodacre v. Breame*, Peake's C. 174: and *Birt v. Hood*, 1 Esp. C. 20; and see also tit. *Interest*, and *Partner*.

The defendant, upon an indictment for perjury, may prove in bar that the action in which the evidence was given, on which the perjury is assigned, had abated before the trial of such action, by the death of a co-plaintiff after issue joined, no suggestion having been entered on the record pursuant to the statute 8 and 9 W. 3, c. 11, s. 6. (t)

PART
IV.

ABUTTALS. See TRESPASS.

ACCEPTANCE. See BILL OF EXCHANGE.

ACCESS. See BASTARDY.

ACCESSORY.

It will be convenient here to consider the evidence applicable to both *principals* and *accessories*. Principals, in cases of felony are of two degrees. A principal in the first degree is the absolute perpetrator of the crime, and is either actually present when it is perpetrated, or commits it whilst absent by an innocent agent or instrument (u). A principal in the second degree is one who is present, aiding and abetting the fact to be done (v). An accessory before the fact is he, that being absent at the time of the felony committed, doth yet procure, counsel, or abet another to * commit a felony (x). A man may there- * 7 fore be convicted as a principal in the first degree, upon evidence that he committed the fact when absent, without the more immediate intervention of any guilty agent. As where A. persuades B. to drink poison, by recommending it as a medicine (y); or where he sends the poison by a third person, ignorant of its quality (z); or incites a mad-

Principal in
the first de-
gree.

(t) *R. v. Cohen*, 1 Starkie's C. 511.

(u) Hale, 615, 616. 2 Haw. c. 29, s. 11.

(v) Hale, P. C. 615. Formerly he who struck alone was principal, and those who were present, aiding and assisting, were accessories, who could not be convicted before the attainder of the principal, 1 Hale, P. C. 437. 40 Ass. 25. 40 E. 3. But it has been long settled, that all present, aiding and abetting, are principals, 1 Hale, P. C. 437. Plow. 97. Whether a person is guilty as a principal in the first or second degree is a question of law, *R. v. Royce*, 4 Burr. 2076.

(z) 1 Hale, P. C. 615. Lord Coke, in his reading on the Statute West. 1, c. 14, says, the word *aid* comprehends all persons counselling, abetting, plotting, assenting, consenting and encouraging to do the act, and who are not present when the act is done, for if present, they are principals, 2 Inst. 182.

(y) 4 Co. 44. 2 Inst. 183.

(z) 9 Co. 81. Kelyng, 52, 53.

PART
IV.Principal in
the second de-
gree.Proof that he
was present.

man to destroy another ; or a child to set fire to a house (a). To prove one to be principal in the second degree, it must be shown *first*, that he was *present* when the offence was committed. But it is not necessary to show that he was actually standing by, within sight or hearing of the fact ; it is sufficient if he was near enough to lend his assistance in any manner to the commission of the offence. As where one commits a robbery or murder, and another keeps watch or guard at some convenient distance (b). So if several set out together, or in small parties, upon one common design, whether of murder or felony, or for any other unlawful purpose, and each takes the part assigned to him, some to commit the fact, they are all, in contemplation of law, *present* when the fact is committed (c). So, if several come to commit a burglary, and some enter, and the rest watch, all are principals (d). So, where a constable's assistant * attempted to apprehend a number of persons in a house, under a warrant for a riot and battery, and fourteen of the rioters issued from the house and killed the constable's assistant, it was held that those within the house, if they abetted and counselled the riot, were, in law, *present*, aiding and assisting, as well as those who issued out and actually committed the assault five rods from the house (e). And, in general, if a party be sufficiently near to encourage the principal in the first degree with the expectation of immediate help or assistance in the execution of felony, he is in point of law *present*. Lord Dacre and others (f) came to steal deer in the park of Mr. Pelham, Rayden, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park ; and it was held that it was murder in them all, and they died for it. So if A. and B. be present, and consenting to a robbery or burglary, though A. only actually commits the robbery, or actually breaks and enters the house, and B. be watching at another place near, or be about a robbery hard by, which he effects not, both are robbers and burglars (g). Where *Hyde* and A., B., C.,

(a) *Ann Course's case*, Foster, 349.

(b) Foster, 350. 1 Hale, 537.

(c) Foster, 350. 353. 1 Haw. c. 38. 1 Hale P. C. 439. Kel. 111.

(d) Foster, 350. 1 Hale P. C. 439.

(e) 1 Hale P. C. 462. Two go into a shop to steal ; a third who stays on the outside to watch and co-operate, is a principal, *R. v. Gogerly and Whitford*, by nine of the Judges.

(f) 1 Hale 439. 443. 245. Fost. 354.

(g) 1 Hale P. C. 537. 1 And. 116, &c. ; differently reported. Fost. 354. See tit. *Personation*.—*Principal*.—*Rape*.

and *D.* rode out to rob, but at Hounslow *D.* parted from the company, and rode away to Colbrook, and *A.*, *B.* and *C.* rode towards Egham, and about three miles from Hounslow, *Hyde*, *A.* and *B.* assaulted a man ; but before he was robbed, *C.* seeing another man coming at a distance, before the assault, rode up to him about a bow-shot, or more, from the rest, intending either to rob him, or to prevent his coming to assist ; and in his absence, *Hyde*, *A.* and *B.* robbed the first * man of divers silk stockings, and * 9 then rode back to *C.* and they all went to London, and there divided the spoil ; it was ruled (according to Lord Hale) upon good advice, *first*, that *D.* was not guilty of the robbery, though he rode out with them upon the same design, because he left them at Hounslow, and fell not in with them ; it may be he repented of the design, at least he pursued it not. *Secondly*, that *C.*, though he was not actually present at the robbery, nor at the assault, but rode back to secure his company, was guilty, as well as *Hyde*, and the two others (*h*). Where three prisoners were charged with feloniously uttering a forged note, &c. and it appeared that one of the prisoners offered the note in payment at Gosport, the other prisoners being then waiting at Portsmouth for his return : the whole being in consequence of a previously concerted plan, the judges (after conviction) held, that the two latter prisoners were entitled to their acquittal, since they were not present when the felony was committed (*i*).

In the case of the *King v. Stewart and Dickons* (*k*), it appeared that the two prisoners had previously agreed to sell forged notes to James Platt, a witness upon the trial, and that the price had been paid. That after the witness had been at the house of the prisoners for the purpose of receiving the notes, Stewart and the witness went to a public house, and that afterwards Dickons came and beckoned them out ; Stewart then said to the witness, ‘ you see Ann there, whom you have seen at our house, she will deliver the goods to you ; I wish you good luck.’ Ann, the woman pointed out by the prisoner Stewart, within three * minutes afterwards delivered the forged notes to * 10 the witness, and the witness did not know whether the prisoners were, or were not, in sight when the notes were so delivered, nor which way they went. The jury found

(*h*) 1 Hale, 537.

(*i*) *R. v. Soares*, and two others, 2 East, P. C. 974.

(*k*) Coram, Garrow, B. Warwick Lent. Assiz. 1818, and afterwards before the Judges MSS. C.

PART
IV.

the prisoners guilty, and stated (the question being left to them by the learned judge), that the delivery of the notes by Ann was in completion of the agreement made by the prisoners, and on their account, and not her own. Execution was respited, in order that the opinion of the judges might be taken upon the question; and all the judges recommended that a pardon should be applied for in respect of the particular offence. Where two persons went in concert to utter a forged note, and one went into a shop to utter it, whilst the other remained at a little distance in the street, it is said to have been held, that the latter was not liable as a principal (*l*).

That he was
aiding and
abetting.

It must be shown, *secondly*, that he was *aiding and abetting* (*m*); which words seem to include every species of assistance which one present can give, either in act, or by his assent, and by his encouragement or readiness to further the general purpose (*n*). For if any one comes for an unlawful purpose, although he does no act, he is a principal (*o*). It is not necessary to show that one, indicted as a principal, was present during the whole of the transaction; it seems * to be sufficient to show him to be present
* 11 aiding and abetting when the offence was consummated, although he was not present at the inception. Where the servants of *A.* feloniously removed goods in *A.*'s warehouse, and *B.* several hours afterwards assisted them in removing the goods *from* the warehouse, it was held that *B.* was a principal, since it was a continuing transaction (*p*). So, where the servants of Dyer, who was the owner of a boat, (and had been employed to convey on shore a quantity of barilla) without the privity of Dyer, separated part of the barilla from the rest, and conveyed it to another part of the boat, and concealed it under some rope, and Dyer afterwards assisted the others in conveying the part

(*l*) Per Graham, B.—O. B. June 1813. Starkie's Crim. Pleadings, 2d edit. p. 86. It is suggested by Mr. Russell, 1475, that this is the same case with that of *R. v. Davis and Hall*, tried Lent. Ass. 1806, for the town of Nottingham.

(*m*) See Lord Coke's exposition of the word *aid*, 2 Inst. 218, and *supra*, 7; see also Foster, 354; and Minshew, Cowell, Skinner, Spelman and Dufresne, on the meaning of the word *abet*; from which it appears that instigation alone, without force, is the sense of the word.

(*n*) Fost. 350. 2 Haw. c. 47.

(*o*) 1 Hale, P. C. 374. 443.

(*p*) *R. v. Atwell & others*, East, P. C. 768.

so separated from the boat, it was held, upon the same ground, that Dyer was a principal (*q*).

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Principals, whether in the first or second degree, are usually charged as being feloniously present, aiding and abetting (*r*); since where a statute creates a new felony, or takes away the benefit of clergy from those guilty of an existing felony, under particular circumstances, the offence partakes of all the incidents to a felony at common law, and all present aiding and abetting are principals, and may be charged as such (*s*). But where the statute by its description includes that party only who does the very act, one who is principal in the second degree only ought to be acquitted either * of the offence generally, or of so much * 12 as the particular statute is applicable to.

The allegation, that the prisoner was *aiding and abetting*, implies an *assent* to the principal act. This assent must be proved either by some act directly done in furtherance of the commission of the crime, which manifests the assent of the prisoner, as by his keeping watch whilst others in his presence break open a house, or by evidence that he was associated with the rest in the prosecution of one common illegal object, in the execution and furtherance of which the principal crime was committed. If *A.* be present when a murder is committed, and takes no part in it, nor endeavours to prevent it, and neither apprehends the murderer, nor levies hue and cry after him, and the matter be done in private, the circumstances would, it seems, be evidence to a jury, of consent and concurrence on his part (*t*). But here the privacy and secrecy with which the fact was accompanied would be a strong circumstance; for if the homicide had been openly committed before witnesses, as it frequently is, where it amounts in construction of law to murder, although *A.*'s conduct might be criminal, it would not render him either principal or accessory (*u*). But in case the murder had been committed in prosecution of an unlawful design, proof that *A.* came to assist, and carry that design into execution, would be evidence to

That he was
aiding and
abetting.

(*q*) *R. v. Dyer & Disting*, East, P. C. 767. per Graham, B. and Le Blanc, J.

(*r*) Where aiders and abettors are mentioned expressly in the statute, the general allegation appears to be sufficient; see Stark. Crim. Pleadings, second edition, 82, 83, 86.

(*s*) See the Coalheavers case, Leach, 76. Staundf. 44. 3 Inst. 45. 1 Hale, P. C. 613. Fost. 354. *R. v. Midwinter and Sims*, Leach. C. C. L. 3d edit. 78. 4 Burr. 2075.

(*t*) Foster, Disc. 3, s. 5.

(*u*) Dalt. 395. Staundf. 40. Fost. Disc. 3, s. 5.

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- convict him as a principal in the second degree (*x*); for in such case the person giving the blow is no more than the instrument by which all strike. In such case, however, it is essential to prove that the murder was committed in the prosecution of some specific unlawful design in which the
- * 13 * prisoner had engaged (*y*); for if the death resulted from the particular malice of the individual who inflicted the blow, and who took the opportunity to revenge himself, the others, who were assembled for a different purpose, will not be involved in his guilt. Three soldiers went to rob an orchard, two got upon a pear tree, the third watched with a drawn sword, and killed the son of the owner, who had collared him; and it was held, that the latter was guilty of murder, but that the two others were innocent, because they came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. But Holt, C. J. said that it would have been otherwise, "if they had all come thither with a general resolution against all opposers," which would have proved that the murder was committed in prosecution of their original purpose (*z*). So where *A.* beat a constable in execution of his office, and being parted from him desisted, and *B.*, a friend of *A.*, rushed in and killed the constable, *A.* not having been engaged after they were parted, it was held to be murder in *B.*, but that *A.* was innocent, since there was no previous agreement to obstruct the constable in the execution of his office (*a*). A general resolution against all opposers, which can be proved either to have been expressly entered into, or which can be inferred from circumstances, as from the number, arms, or behaviour of the parties at or before the scene of action, is strong evidence in cases of this nature (*b*), and shows, when substantiated, that every
- * 14 one present, in the eye of the * law, when the offence is committed is guilty as a principal (*c*). Where, however,

(*x*) Fost. Disc. 3, s. 6. Kel. 116.

(*y*) Fost. Disc. 3, s. 7.

(*z*) Ibid.

(*a*) Per Holt and Rokeby, Js. Hertford Ass. Fost. Disc. 3, s. 7; see also *Plummer's Case*, ib.

(*b*) Fost. Disc. 3, s. 8.

(*c*) The Cases of Lord *Dacre* and *Pudsey*, cited above, were decided on the same principle; the offences of which they stood charged were committed far out of their sight and hearing, yet both were holden to be present. It was sufficient that at the instant the offences were committed by some of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence with those who did the fact. Fost. 354.

A. B. and C. set out with intent to rob on the highway, and A. and B. upon the same day commit a robbery, C. may show in defence that he had previously abandoned the design and separated himself from the party, and that there was not, when the offence was committed, any engagement or reasonable expectation of mutual support and defence to affect him (d).

An accessory, whether before or after the fact, cannot be convicted until the principal has been convicted, but both may be tried at the same time. If the principal has been previously convicted, the conviction may be proved by the record properly authenticated (*e*), which will be *prima facie* evidence to prove the guilt of the principal (*f*), whether the indictment allege the guilt of the principal expressly (*g*), or, as is the more usual course, recites the record of conviction (*h*). In either case the prisoner may insist on every matter both of fact and of law to controvert the guilt of the principal (*i*), for the accessory is considered as *particeps in lite* (*k*). As against an accessory *before the fact*, the general * allegation must next be proved that * 15 he did feloniously and maliciously incite, move, procure, aid, abet, counsel, hire, and command the principal to commit the felony (*l*). Proof sufficient to satisfy this allegation imports evidence of the knowledge and assent of the prisoner to the commission of the felony, that he at least instigated and incited the principal to commit the crime. With respect to the measure of the incitement and force of persuasion used, no rule is laid down; that it was sufficient to effectuate the evil purpose is proved by the result. In principle, it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no de-

Evidence
against an ac-
cessory before
the fact.

(*d*) Fost. Disc. 3, s. 8.

(*e*) See tit. *Record*.

(*f*) See tit. *Judgments* for the reason.

(*g*) As in *Lord Sanchar's Case*, 9 Co. 114. See *Starkie's Crim. Plead.* 2d edit. 140.

(*h*) See Fost. Disc. 3, c. 2, s. 3.

(*i*) See the reason tit. *Judgments*.

(*k*) Fost. 365.

(*l*) See *Stark. Crim. Pleadings*, 130.

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Wife.

Accessory after the fact.

* 16

Variance.

fence to show that the offence would have been committed although the incitement had never taken place (*m*).

A wife may be convicted as a principal felon in uttering a forged certificate for receiving prize-money, although she acted in pursuance of her husband's direction, and the husband may be convicted as an accessory before the fact (*n*).

Against an accessory after the fact, it must be proved, that he, knowing the felony to have been committed, received, relieved, comforted or assisted, *the felon (*o*), or received the stolen goods (*p*). It seems once to have been held, that the knowledge of the accessory was to be inferred from the attainder of the principal in the same county (*q*), because every one is bound to take notice of an attainder in the same county; but this notion appears to be exploded (*r*).

If *A.* be charged as principal in the first degree, and *B.* as aiding and abetting, the indictment will be supported by evidence that *B.* struck the blow, and that *A.* was present aiding and abetting (*s*); and in such case, *B.* may be convicted although *A.* is acquitted (*t*). If *A.* be indicted as accessory to *B.* and *C.*, he may be convicted on evidence that he was accessory to *C.* only (*u*). It has been said, that it was otherwise in case of an appeal (*x*); yet there seems to have been no difference in the two cases as to the rules of evidence. One indicted as a principal cannot be found guilty on evidence showing that he was an accessory before the fact (*y*). Wherever a vari-

(*m*) According to Lord Coke, to cause is to procure or counsel one to forge; to assent is to agree afterwards to the procurement or counsel of another; to consent is to agree at the time of the procurement, or counsel, and he in law is a procurer, 3 Inst. 169. But an assent after the fact committed makes not the party assenting a principal, 1 Hale, 684.

(*n*) *R. v. Morris*, 2 Leach, 696; and see *R. v. Hughes*, Cor, Thompson, B., Lancr. Lent Ass. 1813, Russell, 1478.

(*o*) 1 Hale, P. C. 618.

(*p*) Under the stat. 5 Ann. c. 81, s. 5, see *Larceny—Receiver*.

(*q*) Staundf. 96. 8 E. 4. f. 3.

(*r*) 3 P. Wms. 494.

(*s*) 9 Co. 67. Ibid. 112, b. 4 Co. 42. 3 Inst. 148. 2 Hale, P. C. 292. 1 Plow. 28. *R. v. Wallis*, 1 Salk. 334. *Banson v. Offley*, 3 Mod. 121. 1 Lord Raym. 21. Doug. 207.

(*t*) *R. v. Wallis*, 1 Salk. 334.

(*u*) 9 Co. 119. 2 Hale, P. C. 292. 2 Haw. c. 46, sec. 196,

(*x*) 2 Inst. 183.

(*y*) 2 Haw. c. 26, s. 178, 9. Ibid. c. 350, s. 11.

ance is material as to the principal, it is material and available to the accessory (z); and *vice versa*, where a variance is immaterial to the principal it is immaterial to the accessory (a).

* ACCOMPLICE.

* 17

It seems to be an universal rule, that a *particeps criminis* Competency. may be examined as a witness in both civil and criminal cases, notwithstanding the immorality or illegality of his conduct, provided he has not been convicted of any crime that incapacitates him (b).

In civil actions it was formerly held that a witness could not be admitted to allege his own turpitude, or to disprove an instrument to which he was a party or witness (c); but the rule is now exploded (d), for it is calculated to conceal the truth. The subscribing witnesses to a will have, in several instances, been allowed to give evidence to impeach the will (e); and the same rule applies where the instrument is of a negotiable nature (f).

A clerk, having embezzled his master's property, laid it out in illegal insurances, and he was held to be a competent witness for the master against the insurer (g). So a man, who has pretended to convey lands to another, is a competent witness to prove that * he had no title (h). A * 18 co-assignor of a ship may prove that he had no interest in

(z) 2 Haw. c. 46, s. 194. Summ. 265. 2 Hale, P. C. 292.

(a) 2 Haw. c. 46. *R. v. Macally*, 9 Co. 65. Cro. J. 279. 2 Hale, P. C. 292.

(b) See tit. *Infamous Witness*.

(c) 4 Inst. 279. Str. 1148. Salk. 461. 689. 3 St. Tr. 427. Burr. 1255. 1 T. R. 296. 3 T. R. 31. This was in conformity with the maxim of civil law, *Nemo allegans turpitudinem suam est audiendus*." In the case of *Jordaine v. Lashbrooke*, 7 T. R. 601, Lawrence, J. observed, "persons are continually allowed to allege their own turpitude, as in cases of simony, compounding felony, sale of offices, &c. and possibly that maxim may in our law be confined to the cases of plaintiffs making demands *ex turpi causa*, and to cases of defence in which innocent persons may be prejudiced."

(d) 5 T. R. 579. 7 T. R. 601.

(e) *Lowe v. Jolliffe*, 1 Bl. R. 365. 7 T. R. 604.

(f) 7 T. R. 604.

(g) *Clarke v. Shee*, Cowp. 197.

(h) *Title v. Grevet*, 2 Lord Raym. 1008,

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the vessel (i). The parents may give evidence to bastardize their issue (k).

In the case of *Walton v. Shelley* (l), it was held that the indorser of a promissory note was not competent to prove that it was tainted with usury in its creation; but in the later case of *Jordaine v. Lashbrooke* (m) it was denied that the former decision was warranted by the previous cases; and it was held, that a party to a bill of exchange was competent to prove it to have been void in its creation (n) (1). So in an action for bribery the person bribed is a competent witness, although by the statute (o) the party who discovers the bribery of another is exempted from an action, and the witness intends to avail himself of this exemption by way of defence to an action pending against himself for bribery committed at the same election (p). No one, however, can be a witness for another whilst he is a party to the record. But a co-defendant may be rendered competent by entering a *nolle prosequi* (q); and if there be no evidence to charge one co-defendant in trespass, he may be acquitted under the direction of the court, and give evidence in the cause.

In criminal
proceedings.

In criminal cases it is perfectly clear that an accomplice is a competent witness, previous to his conviction of a crime, which takes away competency, in all cases,

* 19 * whether of treason (r), felony (s), or mere misdemeanor (t);

(i) *Anon.* cited, 1 T. R. 301. *S. P. Rands v. Thomas*, 5 M. & S. 244. If one of several jointly indicted confess, he is a competent witness for the Crown, Holt, 303; 2 Hale, 234, and *qu.* whether if two be indicted, and one only be put upon his trial, the other is not in strictness a competent witness, see 1 Hale, 305, and post, p. 21.

(k) See the Cases tit. *Bastardy*; but see also *R. v. Book*, 1 Wils. 340.

(l) 1 T. R. 296.

(m) 7 T. R. 601.

(n) See *Rich v. Topping*, Peake's Cas. 224. 1 Esp. C. 176. S. C.

(o) 2 G. 2, c. 24.

(p) *Bush v. Ralling*, Say. 289. *Heward v. Shipley*, 4 East, 180. *Edwards v. Evans*, 3 East, 451. *Phillips v. Fowler*, cited Say. 291.

(q) *Man v. Ward*, 2 Atk. 229.

(r) *R. v. Tonge*, Kelyng, 17. 1 Hale, P. C. 303. 7 T. R. 609.

(s) Leach, C. C. L. 133. *R. v. Dr. Dodd*, Leach, C. C. L. 141. *R. v. Westbeer*, Ibid. 12.

(t) 2 Haw. c. 46. *R. v. Cross*, 12 Mod. 520, where the thief was a witness against the receiver.

(1) [See American cases on this point, post, p. 298. note.]

the doctrine is founded on obvious grounds of policy (u), and, perhaps, of necessity. It is also perfectly settled that no promise of pardon, whether it be absolute or conditional, will render an accomplice incompetent (x). There are three classes of persons who are strictly entitled to pardon; *first*, approvers, upon conviction of their associates (y). The practice of admitting an approver to appeal (a matter purely within the discretion of the court) had become obsolete in the time of Sir Matthew Hale (z), who observed that more mischief had arisen to good men from these approvals, upon false accusations by desperate villains, than benefit to the public by the discovery and conviction of real offenders. Since their discontinuance the doctrine of approvals has become more a matter of curiosity than use (a). Although an approver was sworn to the truth of his appeal (b), yet it seems that he was not a competent witness upon the * trial. For this proceeding have * 20 been substituted the enactments of general statutes, and the reasonable and equitable practice of admitting an accomplice to give evidence under a conditional promise of pardon, in case he make a fair and impartial disclosure.

These statutes, in cases of coining, robbery, burglary, housebreaking, and horsestealing (c), enact, that if an offender being out of prison shall discover two or more persons who have committed the like offences, he shall be entitled to a pardon of all capital offences, excepting only murder and treason (d).

These statutes, and also others which protect an offending party who discovers another offender, seem to make

(u) 1 Hale, 303.

(x) *Tongt's case*, 1 Hale, 304. *Layer's case*, 10 St. Tr. 259. Lord Hale seems to have been of a different opinion in case of a pardon promised for witnesses against others, 1 Hale, 304; 2 Hale, 280; and in the case of an approver, 1 Hale, 303.

(y) Cowp. 339. Leach, C. C. L. 140.

(z) 2 Hale, 226.

(a) If there were a dozen appellees the approver was bound to fight them all if they waged battle, 2 Haw. b. 2, c. 24, s. 24. 2 Hale, 233, 234. 3 Inst. 130. But as he had the power to make his own selection, there was room for the exercise of much discretion.

(b) Staundf. lib. 2, c. 56, p. 145. 1 Hale, 303; but see *Layer's case*, 10 St. Tr. 259.

(c) Robbery, 4 W. & M. c. 8, s. 7. Coining, 6 W. 3, c. 17, s. 12. Burglary, housebreaking and private stealing, 10 W. 3, c. 25, s. 5. 5 Ann. c. 31, s. 4. Uttering counterfeit money, 15 Geo. 2, c. 28, s. 4, which extends to such offences only. Illegally buying or receiving stolen lead, iron, or other metals, 29 Geo. 2, c. 30.

(d) See 4 Bl. Comm. 330, 331.

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Competency.

the latter a competent witness by legislative declaration; for if he were not to be a competent witness, the provisions of the statutes would be almost nugatory and useless; it would be holding out an inducement to offenders to make a discovery, and when made, they would be precluded from the benefit of it (e).

- * 21 * In present practice, where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to pardon, the usage, lenity and practice of the court is, to stay the prosecution against them; and they have an equitable title to a recommendation to the king's mercy (f).

Under such circumstances, there can be no doubt, as to the competency of the accomplice, upon any principle; the condition is not that he shall convict, nor even that he shall give evidence unfavourable to any prisoner, but that he shall make a fair disclosure of what he knows. The credit to be given to such a witness is for the consideration of the jury: the acknowledged turpitude of the witness must necessarily stamp his testimony with suspicion; and it is to be the more carefully watched, since such a witness lies under a strong temptation to substantiate the account which he has already given, in the hopes of pardon, and is likely to suppose that his object will be gained by a conviction, and may be frustrated by an acquittal.

No accomplice can be examined against his consent, for he is not bound to criminate himself. Where he is willing to give evidence, it seems to be the more proper course not to include him in the indictment (g). The practice is (where the accomplice is in custody), for the

(e) See Lord Ellenborough's observations in *Heward v. Shipley*, 4 East, 180; *Bush v. Ralling*, Say. 289; *R. v. Rockwood*, 4 St. Tr. 684-6; *R. v. Teasdale*, 3 Esp. 68; *Mead v. Robinson*, Willes, 422; where it was held, that the legislature, by holding out inducements, and offering an indemnity, intended to make the discoverers legal witnesses. And *Philips v. Fowler*, 8 Geo. 2, cited Willes, 425; *R. v. Luckup*, 9 Geo. 2. B. R. MSS. cited Willes, 425, in the note; where, in a prosecution for penalties under the stat. 9 Ann. c. 14, s. 9, the loser of money at cards was held to be a good witness to prove the loss. So in *R. v. Johnson*, cited *ibid.* See *Interested Witness*.

(f) *R. v. Rudd*, Leach, C. C. L. 140, per Lord Mansfield, Cowp. 339.

(g) Hale, 305. Lord Hale there says, the witness is never indicted, because that weakens and disparages his testimony, but possibly does not wholly take away his testimony.

counsel for the prosecution to move that the * accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential (*h*). The admission of the party as a witness amounts to a promise of recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime.

An accomplice, as it seems, is a competent witness, and may be examined, if he be willing, although he is indicted along with others, provided he be not put upon his trial at the same time with the others (*i*); for an indictment against several is several as to each; so he is if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offence which disqualifies him (*k*). So an accomplice is a competent witness for his associates, as well as against them, although they be severally indicted for the same offence (*l*), whether he is convicted or not, provided he be not disqualified by a judgment.

When indicted
with others.

* By a breach of the condition the accomplice forfeits * 23 his claim to favour, and is liable to be tried and convicted (*m*) upon his confession (*a*).

(*h*) If, however, an accomplice be taken before the grand jury by means of a surreptitious order, the indictment will still be valid, *R. v. Dodd, Leach*, C. C. L. 184. And it seems to be a general rule, that the means by which evidence was obtained will be no objection to the evidence itself. A justice of the peace has no authority to pardon an offender, and to tell him he shall be a witness at all events against others, *R. v. Rudd, Leach*, C. C. L. 140; Cowp. 331.

(*i*) Qu. and see 1 Hale, 305, where it is said, the party, that is the witness, is never indicted, because that will much weaken and disparage his testimony, but possibly not wholly take away his testimony. See also *R. v. Ellis, Macnally*, 55.

(*k*) *Lee v. Gansel*, Cowp. 1.

(*l*) 2 Hale, 280, cites the case of *Bilmore, Gray and Harbin*, 2 R. A. 685, pl. 3; and *Gunston v. Downs*, ib. That is, as it seems, where they are severally tried for an offence several in its nature; for in such case it seems to make no difference whether they are severally or jointly indicted.

(*m*) In a late instance, a prisoner who had made a confession, after a representation made to him by a constable in the gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against his associates on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. *R. v. Burley*, Cor. Garrow, B. Leicester Lent Assizes 1818. And the conviction was afterwards approved of by all the judges. MSS. C.

(*a*) In the case of *R. v. Lee*, Northampton Ass. 1818, where the question was, whether an accomplice who had been taken before

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Force of such
testimony.

Where there is no evidence, or but slight evidence, against one of the parties upon his trial, the court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him to admit his testimony (n).

With respect to the force and effect of such testimony, it must, from its very nature, be regarded with great jealousy and suspicion. It is hard (Lord Hale observed) (o), to take away the life of any person upon the evidence of a *particeps criminis*, unless there be very considerable circumstances, which may give the greater credit to what he swears. In strictness of law, indeed, a prisoner may be convicted on the testimony of a single accomplice (p); since, where competent evidence is adduced, it is for the jury to determine on the effect of that evidence. In practice it is usual to direct the jury to acquit the prisoner, where the evidence of an accomplice stands uncorroborated * 24 ed * in material circumstances; this, however, is a matter resting entirely in the discretion of the court (q). It is to be observed, that in the case of *Atwood and Robins* (r), which was an indictment for a highway robbery, there was some confirmation of the accomplice, since the prosecutor swore that he was robbed by three men, and the account given by the accomplice corresponded exactly with the circumstances stated by the prosecutor. It seems that it is not necessary that the accomplice should be confirmed in every circumstance, or with respect to each of the prisoners against whom he testifies. If it were necessary to confirm his evidence in all points his testimony would be useless (s). In judging of the credit due to the testimony of an accomplice, it seems to be a necessary principle that his testimony must be wholly received as that of a credible witness, or wholly rejected. His evidence, on points where he is confirmed by unimpeachable evidence, is useless; the question is, whether he is to be believed upon points where he receives no confirmation, and of this the

the Grand Jury could legally be convicted, the Judges were of opinion that he might, but some of them doubted.

(n) 1 Sid. 237. Trials per Pais, 148. Style, 401. 12 Ass. 12. 34. 2 Haw. c. 46, s. 98. Sav. 34. pl. 81.

(o) 1 Hale, P. C. 305.

(p) *R. v. Atwood*, Leach, C. C. L. 521, *R. v. Durham and Crowder*, Leach, C. C. L. 538. Lord Kenyon's observations in *Jordaine v. Lashbrooke*, 7 T. R. 601. 1 Hale, P. C. 303, 304, 305.

(q) *R. v. Durham and Crowder*, Leach, C. C. L. 528.

(r) Leach, C. C. L. 521.

(s) *R. v. Swallow* and others, at York, 1818, Cor. Thompson, B. under a special commission.

jury are to form their opinion from the nature of his testimony, his manner of delivering it, and the confirmation which it receives, derived from other evidence which is unsuspected (*o*). If upon such consideration his character be established as the witness of truth, he is credible in matters where he is not corroborated; if, on the other hand, notwithstanding the corroboration upon particular points, lurking doubts and suspicions *still remain as to * 25 his credit, his testimony becomes useless (*s*).

ACCORD.

AN *Accord and Satisfaction* is, in general, evidence in an action upon the case, under the general issue (*t*); but in an action of trespass it must be pleaded. An accord must be shown to have been received in full satisfaction of the thing demanded (*u*); and although the plaintiff has agreed to take it in satisfaction, it will not be a bar to the action, unless it operate in satisfaction (*x*). A less sum cannot operate in satisfaction of a greater (*y*); but it is otherwise where an additional security is given for the payment of a less sum by a third person (*z*). So if a debtor assign over all his effects to a trustee, to raise a fund for the payment of a composition to his creditors (*a*). The general rule is, that the court will see that there has been a reasonable satisfaction (*b*).

(*o*) Ibid.

(*s*) In *R. v. Jones*, 2 Camp. 133, Lord Ellenborough observes, "Within a few years a case was referred to the twelve judges, where four men were convicted of burglary on the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the judges were unanimously of opinion that the conviction of all four was legal; and upon that opinion they all suffered the sentence of the law." And see *R. v. Dauber & al.* 3 Stark. C. 34.

(*t*) *Huzham v. Smith*, 2 Camp. 19. *Lane v. Applegate*, 1 Starkie's C. 97. *Paramore v. Johnson*, 1 Lord Raym. 566; 12 Mod. 376.

(*u*) See Com. Dig. *Accord*, B. 1. *Arbitrament, or Accord with satisfaction*, is always, a good plea where the action is founded on a covenant with subsequent damages; *secus*, where the debt arises *tempore confectionis scripti*, *Blake's Case*, 6 Co. 44.

(*x*) See *Edgcombe v. Rodd*, 5 East, 294, as to what amounts to a legal satisfaction; and Com. Dig. *Accord*, B. 1.

(*y*) *Fitch v. Sutton*, 5 East, 230. *Lynn v. Bruce*, 2 H. B. 317. *Heathcote v. Crookshanks*, 2 T. R. 24.

(*z*) *Steinman v. Magnus*, 11 East, 390.

(*a*) *Heathcote v. Crookshanks*, 2 T. R. 24.

(*b*) *Cumber v. Wane*, Str. 426.

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* To a declaration on a specialty, or for a trespass, an accord and satisfaction must be specially pleaded, and the evidence must of course depend upon the nature of the plea, and the issue taken.

When the accord has been proved by means of a witness, or by the admission of the other party, the performance of the terms accordingly must also be proved, where it is executory in its nature. After evidence of an agreement between the plaintiff and defendant, with other creditors of the defendant, to accept a composition in satisfaction of their respective debts, to be paid within a reasonable time, it would not be sufficient to prove a tender, and a *refusal* on the part of the plaintiff to accept the composition (c). If a plaintiff in an action against several for a tort, accept a sum from one to forego the action, he cannot, it seems, proceed against the rest (d).

* ACCOUNT.

For the evidence to support a count upon an *account stated*, see *Assumpsit*.—With respect to the evidence in an *action of account* little need be said, since the proceeding seems to be obsolete. The evidence depends upon the nature of the plea in bar, which alleges that the defendant never was bailiff or receiver to the plaintiff, or that he has accounted, or that the plaintiff has released him (e), &c.

(c) *Heathcote v. Crookshanks*, 2 T. R. 24. This was on demurrer to a plea.

(d) *Dufresne v. Hutchinson*, 3 Taunt. 117. See *Cumber v. Wane*, Str. 426, where it was held, that a payment of a promissory note for 5*l.* could be no satisfaction of a debt of 15*l.*; *Fitch v. Sutton*, 5 East, 230, above cited; *Kearlake v. Morgan*, 5 T. R. 513, where it was held, that the defendant might plead that he indorsed a promissory note, of which he was payee, to the plaintiff, in satisfaction of the demand. The giving the security of a third person for *part* of a debt only, as for part of a stipulated composition, will be no bar. (*Walker v. Seaborne*, 1 Taunt. 526.) But if, upon the faith of an agreement amongst creditors to take less than their whole demand, a third person becomes surety for the amount, a creditor, after receiving the amount, cannot sue the debtor, because it would be a fraud upon the surety. *Steinman v. Magnus*, 2 Camp. 124; 11 East, 390. If creditors agree to give time to their debtor for payment of their respective debts, and to take his promissory notes for their amount, they cannot, unless the agreement has been broken by the debtor, sue him for the amount. *Boothbey v. Sowden*, 3 Camp. 175. See *Cranley v. Hillary*, 2 M. & S. 122. *Bradley v. Gregory*, 2 Camp. 383. [Yelv. 11. a. note (1), & cases there cited. Dalison, 49. pl. 13. 9 Johns. 333.]

(e) 1 Roll. Ab. 121. [See Yelv. 202, note (1) Amer. ed.]

Upon a plea that he was never receiver, the defendant cannot show that he received the money from the plaintiff by way of bailment, to deliver to another person, and that he did deliver it accordingly ; for he did receive the money, although he was to be accountable only conditionally, and therefore the evidence does not support the plea (*f*). Neither under such a plea can he give a release in evidence (*g*). The burthen of proof on such a plea lies upon the plaintiff (*h*). Where he charges the defendant as receiver by the hands of *A.*, it is sufficient for him to prove that *A.* directed the defendant to borrow of another to pay the plaintiff, and that the defendant borrowed accordingly, and that *A.* gave his bond to the lender (*i*). (1)

ACKNOWLEDGMENT. See *Admission*.

Frauds, Statute of.

ACQUITTAL. See above Part II. sec. lxxiii.

ACTION, commencement of, how proved. See *Writ. Limitations.—Time.*

* ACTS OF PARLIAMENT. See tit. *Statute*.

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ADMINISTRATOR. See tit. *Executor*.

ADMISSIONS.

It is a matter of obvious and daily remark, how much of the materials of evidence in ordinary practice is derived from the admissions, direct and indirect, of the parties themselves, and how difficult it would frequently be, if not impossible, to establish the truth by means of any other evidence. Evidence of this kind admits of great varieties both in its nature and application. In many instances the

Nature of
admissions.

(*f*) 2 Roll. Ab. 683. Selw. N. P. 5.

(*g*) *Willoughby v. Small*. 1 Brownl. 24.

(*h*) Hob. 36.

(*i*) *Harrington v. Deane*, Hob. 36.

(1) [But if the declaration charge the defendant as bailiff of the plaintiff's goods, to make profit of for the plaintiff, and as receiver of certain sums by the hands of *A.* & *B.* being the money of the plaintiff—the evidence is of money received from *C.* & *D.* on partnership account, the plaintiff and defendant being partners, the variance is fatal. *Jordan v. Wilkins*, C. C. Jan. 1811. M.S. Wharton's Digest, 2.]

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- admission is directly and expressly made with a view to establish the fact, and in order to supersede the necessity of any other proof; as where it arises upon the face of the pleadings, or is made by matter of record, or by specialty, by which the party is estopped from afterwards denying the admitted fact. In other instances, although there be no direct and express admission for such a purpose, yet if a representation be made of any fact, with a view to influence the conduct of another, or to derive an advantage to the party, and which cannot afterwards be denied without a breach of good faith, such an admission will not only be evidence of the fact, but will usually preclude the party who has made it from insisting upon the contrary. In such cases the admission does not operate merely as presumptive evidence of the actual truth of the fact, which must give way to positive proof of the contrary, but precludes, and as it were estops the party, on grounds of policy, from repudiating his own representation, and renders the actual truth of the fact immaterial. In other instances again, such evidence rests * simply on the presumption, that the party would not have admitted a fact contrary to his own interest, unless it had been true; such admissions are frequently of the most forcible nature, as in the case of a confession of guilt by a prisoner (a). It is a most general and extensive rule, that all a man's acts and declarations shall be admitted in evidence whenever they afford any presumption against him: for it is to be presumed, that he acted or spoke consistently with his knowledge of the truth. All presumptions, founded upon a man's conduct are referrible to this head, for a man's acts and conduct are indications which frequently afford presumptions as strong as express declarations; the very silence of a party will frequently supply a strong inference, as, for instance, where one makes a claim upon another, before witnesses, the justice of which the latter does not deny.

Admissions
made with a
view to evi-
dence,

The admissibility and effect of evidence of this description will be considered generally, with respect to the *nature and manner* of the admission itself; and secondly, with respect to the *parties* to be affected by it. In the first place, as to the nature and manner of the admission, it is either made, *first*, expressly with a view to evidence; or, *secondly*, with a view to induce others to act upon the representation; or, *thirdly*, it is an unconnected or casual representation. In general, a party cannot contradict that by evi-

(a) *Vide Supra*, Part L sec. xiv. p. 30; *infra*, 48.

dence, which he has admitted on the pleadings; nor can the jury find any fact contrary to such admissions, for they are sworn to try the matter in issue between the parties, so that nothing else is properly before them (*b*).

* An admission upon a plea does not operate as an admission with respect to the proof of an issue upon any other plea; (1) and although the form of protestations is still adhered to in pleading, for the purpose of precluding the inference (*c*) that the party pleading one matter meant to admit another, they seem to be but of little use at the present day. So where a party has solemnly admitted a fact, under his hand and seal, he is estopped not only from disputing the deed itself, but every fact which it recites (*d*). Thus, if one deed be recited in another, proved to be executed by the party, the recital will be evidence of the execution of the recited deed (*e*). In the case of *Shelley v. Wright* (*f*) it was held that the obligor of a bond was estopped from averring against the obligee, that he had not received certain sums of money for the obligee, recited in the condition of the bond to have been so received by him. So a recital of a lease in a deed of release is evidence of the execution of such a lease (*g*). So the date of a lease is evidence that it was executed the same day (*h*). But the whole of a recital is to be taken; and therefore if a patent be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be * proof of a surrender (*i*). Where a covenant to lay out a sum in an annuity recited that the covenantor had given a bond for the payment of the money, the recital was held to be evidence of the bond (*k*).

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view to evi-
dence.

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(*b*) B. N. P. 298. So the payment of money into court admits the character in which the plaintiff sues, and his right to recover at least to the amount of the money so paid. 4 T. R. 579. 2 T. R. 275. See tit. PAYMENT INTO COURT, post. 1093, & seq.

(*c*) See Co. Litt. 124, b. Doct. Pl. 295. 2 Will. Saund. 103, n. 1.

(*d*) B. N. P. 298. See vol. i, p. 296. In other cases, although the parties may be estopped, the jury are not. *Goddard's case*, 2 Co. 4, b.; B. N. P. 298.

(*e*) See tit. DEED, & 1 Salk. 286.

(*f*) Willes, 9. See also *Cossens v. Cossens*, Willes' R. 25.

(*g*) Per Holt, J. 1 Salk. 286. Com. Dig. *Estoppel*, B. 5.

(*h*) 1 Salk. 485.

(*i*) 2 Vent. 171. 1 Com. Dig. *Evidence*, B. 5.

(*k*) 2 P. Wms. 432. *Marchioness of Annandale v. Harris*.

(1) [See Vol. 1. p. 296, note (1), and p. 389, note (1).]

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Admissions
which have
been acted
upon.

So in an action against a master for not inserting the true consideration in an indenture of apprenticeship, the recital in that part of the indenture executed by the defendant, that *A. B.* put himself apprentice, &c. is evidence of that fact against the defendant (*l*). So a grant to a corporation by a particular name is evidence as against the grantor, that the corporation was at that time known by that name (*m*). But a recital will not operate as an estoppel, or as evidence, against one who was neither a party to the deed, nor claims under a party (*n*).

Secondly, there is a strong line of distinction between admissions or conduct, upon which a party has induced others to act, or by means of which he has acquired some advantage to himself, and those admissions which have been made without any reference to the matter litigated, and which are not immediately connected with it; in the former case the party is usually concluded absolutely by such an admission; as where he makes an admission for the purpose of trial (*o*). * Where a man has cohabited with a woman, and treated her in the face of the world as his wife, he cannot afterwards object to a creditor who supplied her with goods, that she is not his wife (*s*). So where a man has held himself out to the world in any particular character, he cannot afterwards divest himself of it, in order to claim that to which under the assumed character he is not entitled (*p*). So a man who acquiesces several years in a commission of bankrupt, and solicits the votes of creditors in the choice of assignees, cannot afterwards dispute the commission (*q*). So a defendant is es-

(*l*) *Burleigh v. Stibbs*, 5 T. R. 465.

(*m*) *Mayor of Carlisle v. Blamire*, 8 East, 493.

(*n*) 1 Salk. 286. Com. Dig. *Evidence*, B. 5. Ibid. *Estoppel*, A. 2. But it may be secondary evidence where the original is lost. 1 Salk. 286. Com. Dig. *Evidence*, B. 5. But it operates against those who claim under the party. *Fitzgerald v. Eustace*, Bac. Ab. Ev. 647. 2 P. Wms. 432. [See ante, Vol. I. p. 369, and note (1).]

(*o*) Such an admission must either be proved to have been signed by the Attorney on the Record, or by the authority of the party himself. See vol. i. p. 365, note (*k*).

(*s*) *Watson v. Threlkeld*, 2 Esp. 637. *Robinson v. Nahon*, 1 Camp. 245. *Munro v. De Chemant*, 4 Camp. 215. [In this last case, Lord Ellenborough held, that the man was not liable for necessaries supplied to the woman, after they had separated, if they had not been married.]

(*p*) *Watson v. Threlkeld*, 2 Esp. 637. *Robinson v. Nahon*, 1 Camp. 245.

(*q*) *Like v. Howe and Rogers*, 6 Esp. C. 20. *Flower v. Herbert*, 2 Ves. 326. [See also *Clarke v. Clarke*, 6 Esp. C. 61.]

topped, by the recognizance of bail entered into for him by the name by which he is sued, from pleading a misnomer, although he is no party to the recognizance (*r*); for in these and other such cases, the party, by taking the benefit of the act, has conclusively adopted it. So where a man has made a deliberate admission *in rem*, by giving his promissory note for the amount of goods, by entering into a bond, or other obligation, for the amount of goods sold, he is conclusively bound by it in the absence of fraud, or, perhaps, of mistake; for the very intent and purpose of the acknowledgment is, that it shall operate as conclusive evidence against the party (*s*). Where, however, a receipt has been given for money, it is not so conclusive but that the * party may show that it was given under a mistake (*u*), and that he did not receive the sum or thing in question (*l*). So a parish certificate is evidence, for all the rest of the world, against the parish which granted it, and conclusive as to the parish to which it was directed (*x*). Where a plaintiff signed himself *M. D.* it was held that he was to be taken for a physician, and that he could not maintain an action for fees (*y*). So it has been said, that proof of the bankrupt's submission to a commission is evidence against him of his being such (*z*), as, if he obtain his dis-

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(*r*) *Meredith v. Hodges*, 2 N. R. 453.

(*s*) See *Nash v. Turner*, 1 Esp. 217. *Solomon v. Turner*, 1 Starkie's C. 51. [See 1 Taunt. 366. n.] So a tenant cannot dispute his landlord's title; nor can a copyhold tenant dispute the title of the lord of the manor, *Doe d. Nepean v. Buddam*, 5 B. & A. 626, see tit. *Use and Occupation*; and tit. *Ejectment*, post, 534. A tenant is concluded by the statement which he makes to his landlord as to the time of entry, vid. *Ejectment*, post, 525. One, who being asked his name previous to the suing out of process, represents it to be John, cannot in an action of trespass against the sheriff insist that his name is William. *Price v. Harwood*, 3 Camp. 108; and see *Bass v. Clive*, 4 M. & S. 13. Post, p. 1603.

(*u*) *Stratton v. Rastall*, 2 T. R. 366. *Benson v. Bennett*, 1 Camp. 394. *Bristow v. Eastman*, 1 Esp. C. 172.

(*x*) 4 T. R. 256. *R. v. Headcorn*, Burr. S. C. 253.

(*y*) *Lipscomb v. Holmes*, 2 Camp. 441. See *Chorley v. Bolcot*, 4 T. R. 317.

(*z*) *Haviland v. Cook*, 5 T. R. 655.

(1) [*Stackpole v. Arnold*, 11 Mass. Rep. 27. *Tucker v. Maxwell*, ibid. 145. *Ensign v. Webster*, 1 Johns. Cas. 145. *House v. Low*, 2 Johns. 378. *Johnson v. Weed*, 9 Johns. 310. *Putnam v. Lewis*, 8 Johns. 389. *O'Neale v. Lodge*, 3 Har. & M'Hen. 433. *Trisler v. Williamson*, 4 Har. & M'Hen. 219. *Thompson & al. v. Faucett*, 1 Peters' Rep. 182. acc.]

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charge as a bankrupt under a judge's order (a). But the mere surrender of the bankrupt is not sufficient, because it is compulsory (b). The fact, that a party has proved a debt under a commission of bankrupt is not even *prima facie* evidence, in an action by the assignees of the bankrupt against that party, of the requisites to support the commission (c); for a creditor has not the means of knowing what was the evidence upon which the party was declared a bankrupt; and by proving the debt he at most gives credit to the petitioning creditor, and the commissioners, that the former has not sued out a commission, nor the latter declared the party bankrupt without proper * 34 * grounds (d); and it is not reasonable that he should be put to the dilemma of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed.

Collateral admissions.

Thirdly. Where the admission or declaration is quite foreign to the question pending, although admissible, yet it is not in general *conclusive* evidence; and though a party may, by falsifying his former declaration or oath, show that he has acted illegally and immorally, yet as he is not guilty of any breach of good faith in the existing transaction, and has not induced others to act upon his admission or declaration, nor derived any benefit from it against his adversary, he is not bound by it: the evidence in such cases is merely presumptive, and liable to be rebutted. Where the admission consists in a loose and careless declaration, if it be evidence at all, it is of little weight (e). Proof that *B.* has dealt with *A.* as the farmer of the post-horse duties is evidence in an action by *A.* against *B.*, to prove that he is so (f). Upon an indictment under the

(a) *Goldie v. Gunston*, 4 Camp. 381. *Mercer v. Wise*, 3 Esp. 219. [See 11 Ves. 409.]

(b) Per Lord Ellenborough, 4 Camp. 382.

(c) 16 East, 191. It had before been held, that the proving a debt under a commission of a bankrupt *estopped* the party from afterwards disputing it. Per Lord Mansfield, *Walker v. Burnell*, cited 3 T. R. 321, 2.

(d) *Rankin v. Horner* and another, 16 East, 191. But see *Maltby v. Christie*, 1 Esp. C. 340. *Walker v. Burnell*, Dougl. 317, 3 T. R. 321.

(e) 4 Burr. 2057; 2 Wils. 399; and Lord Ellenborough's observations, 1 M. & S. 637. See also *R v. Clarke*, 8 T. R. 220, post, 627; *R v. Long Buckby*, 7 East, 45. An admission by the plaintiff at a tavern, that he had been discharged as an insolvent, was held to be inconclusive, as comprising matter of law as well as of fact. *Summerset v. Adamson*, 1 Bing. 73.

(f) *Radford v. McIntosh*, 3 T. R. 632.

27th of Eliz. for remaining in this kingdom forty days after taking orders from the see of Rome, proof that the defendant had officiated here as a Romish priest was held to be evidence of his having taken orders (*g*).

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admissions.

In an action for non-residence, proof that the defendant has acted as the parson, is evidence against him that he is such (*h*). In an action for not setting * out tithes, proof * 35 that the defendant has paid tithes to the plaintiff is evidence of his title to receive them (*i*). An acknowledgment by the defendant that his trade is a nuisance, is admissible, although not conclusive evidence against him, upon an indictment for setting up his trade at another place (*k*). Proof, that *A. B.*, as the proprietor of a newspaper, had given security for the payment of the duties on advertisements, and had from time to time applied to the stamp-office concerning duties on the paper, was held to be evidence that he was the publisher (*l*). A description by the party as to his situation is evidence against himself that he holds that situation (*m*). And therefore, on an information against a military officer for false musters, the returns themselves in which he described himself to be such officer were held to be evidence of the fact (*n*).

The oath of a party taken before the commissioners of the income-tax is evidence upon an information under the game-laws (*o*), but not conclusive. So the omission of a debt by an insolvent in his schedule is evidence against him, although it does not estop him from suing (*p*). So in a suit between the lord of a manor and the devisee of a copyhold, the recital of the devise in the admittance is evidence of the devise against the lord, although it would not have been so against the heir (*q*).

In an action for bribing one who had a vote at an * elec- * 36 tion, it seems that the offer to bribe is evidence against the defendant that the party solicited had a right to vote (*r*).

(*g*) *R. v. Kerne*, 2 St. Tr. 964. *R. v. Bromwich*, 2 St. Tr. 966.

(*h*) *Bevan v. Williams*, 3 T. R. 635. *n*.

(*i*) Per Lord Kenyon, 3 T. R. 635. 4 T. R. 367, per Buller, J.

(*k*) *R. v. Neville*, Peake's C. 91.

(*l*) *R. v. Topham*, 4 T. R. 126.

(*m*) *R. v. Gardner*, 2 Camp. 513.

(*n*) *Ibid*.

(*o*) *R. v. Clarke*, 8 T. R. 220.

(*p*) 3 Camp. 13.

(*q*) Lord Raym. 735.

(*r*) *Coombe v. Pitt*, 3 Burr. 1586, and *Rigg v. Curgenven*, 2 Wils. 895. In both those cases the bribee was admitted to vote, which

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admissions,

In the case of *Morris v. Miller* (s) it was held, that, in an action for criminal conversation, an admission by the defendant that he had committed adultery with the wife of the plaintiff, was not sufficient, without proof of a marriage in fact. But when this doctrine was urged in a subsequent case (t) the court observed, as to the case mentioned of criminal conversation, "To be sure, a defendant's saying in jest, or in loose rambling talk, that he had lain with the plaintiff's wife, would not be sufficient alone to convict him in that action; but if it were proved that the defendant had seriously and solemnly recognized that he knew the woman he had lain with was the plaintiff's wife, we think it would be evidence proper to be left to a jury, without proving the marriage."

Answers in chancery, as has been seen, operate as admissions upon oath (u).

It seems, however, that an admission by the defendant, even to an answer in chancery, is merely secondary evidence as to the execution of a deed, and therefore does not supersede the necessity of proving it by the subscribing witness, because a fact may be known to the subscribing witness, which is *not known to the obligor; and he is entitled to avail himself of all the knowledge of the subscribing witness relating to the transaction (x). But this objection does not apply where the party enters into an admission with a view to the trial of the cause.

So in some other cases, where the subject of admission is usually authenticated and proved in a formal and solemn manner, and the existence of the fact includes legal considerations not likely to be understood by the party; better evidence than his simple oral admission is frequently required; as, where a prisoner upon an indictment for bigamy has admitted the former marriage (y);

was held to be the strongest evidence of his right to vote; but Lord Mansfield and the rest of the Court, (Burr. 1590,) held expressly, that a man who had given money to another for his vote should not be admitted to say that he had no vote.

(s) 4 Burr. 2057. Qu. whether this is the same with the case cited 2 Wils. 399, under the names of *Dr. Smith v. Miller*.

(t) 2 Wils. 399.

(u) *Supra*, vol. i. 288, part II, sec. cxiii.

(x) Per Le Blanc, *J. Call v. Dunning*, 4 East, 53; *Abbott v. Plumb*, Dougl. 216.

(y) See tit. *Polygamy*. So where the plaintiff in assumpsit had admitted his discharge under an insolvent act, which was set up as a defence, see 3 Camp. 286; and see tit. *Insolvent Act*.

for this, it has been held (z), does not supersede the necessity of formal proof of the first marriage.

So a mere voluntary affidavit is evidence against the party who makes it as a confession (a). So, as has been seen in some cases, a bill in equity is evidence against the complainant (b).

In general an admission may be presumed, not only from the declaration of a party, but even from his acquiescence or silence. As, for instance, where the existence of the debt, or of the particular right, has been asserted in his presence, and he has not contradicted it. So an acquiescence and endurance, when acts are done by another, which, if wrongfully done, are encroachments, and call for resistance and opposition, * are evidence, as a tacit admission that such acts could not legally be resisted (c). When presumed. 38

Where notice to quit is served personally upon a tenant, and he makes no objection to the time specified in the notice it is *prima facie* evidence of admission and acquiescence (d); but if the party cannot, or does not, read the notice when served, no such inference can be made (e).

Evidence of this class declines by gradual shades from the most express and solemn admissions, down to expressions and acts which afford but remote and weak presumptions as to the particular fact in question; for it has already been seen, that the conduct of the party himself, who knows the truth of the fact, or who may be presumed to know it, is always evidence against himself.

An admission made for the purpose, as it is usually termed, of buying peace, is not allowed to be taken advantage of for the purposes of evidence, since the offer may have resulted, not from a consciousness of the truth of the claim, but a desire to avoid litigation (f). And, therefore, where it appears to be probable that such was the motive the evidence is not admissible (g).

(z) By Le Blanc, J., York Assizes.

(a) Style, 446. *Sacheverel v. Sacheverel*, Bac. Ab. Ev. 628.

(b) *Vide antea*, vol. I. 286.

(c) See the observations of Abbott, Ld. Ch. J. in *Steel v. Prickett*, 2 Starkie's C. 471.

(d) See *Ejectment by Landlord*, post. 523, & seq.

(e) *Thomas d. Jones v. Thomas*, 2 Camp. 647. *Doe v. Forster*, 13 East, 405. *Doe v. Biggs*, 2 Taunt. 109.

(f) 3 Esp. C. 113. B. N. P. 236. 1 Esp. C. 143. The rule does not extend to an offer to refer, for that is not a concession for the purpose of peace; *Thomas v. Austen*, 2 D. & R. 359; nor to a treaty which is concluded, *Froggell v. Lewellyn*, 8 Price, 122.

(g) And therefore it is said, that if A. sue B. for 100*l.*, and B.

PART
IV.

Exceptions and
limitations,

* So an admission made conditionally, where the condition has not been performed, or with reference to particular circumstances, or to the particular state of the pleadings, &c. is not admissible in evidence under different circumstances. It was once held, that admissions made upon a reference which turned out to be ineffectual, were not afterwards admissible; but Lord Kenyon said, in a subsequent case, that this was going too far, and that he should receive all such admissions as the party would be compelled to make by a bill of discovery (*h*), and the arbitrator may be called as a witness to prove them.

Effect of.

Admissions by a bankrupt upon an examination before commissioners, are evidence against him, although he might have demurred to the questions (*i*), because they might subject him to penalties. And so it seems are all answers made by a witness in examination in a court of justice, although he might have objected to answering the questions (*k*). But it will be seen that admissions or confessions extorted by any kind of duress or threats are not evidence in criminal cases.

By a party to
the record.

* 40

The admission of a party on the record is always evidence, although he be but a trustee for another, and although it appear from the admission itself that *he is such (*l*). And, therefore, an admission by the obligee of

offer to pay 20*l.*, it shall not be received as evidence, for that neither admits nor ascertains any debt, and is no more than saying he would give 20*l.* to get rid of the action; but that if an account consist of ten articles, and *B.* admit that such a one is due, it will be good evidence for so much. Peake's Ev. 19, cites Bull. N. P. 236. In the case of *Walridge v. Kennison*, 1 Esp. C. 143, Lord Kenyon is stated to have held, that an admission or confession made pending and under the faith of a treaty, and into which the party might have been led by the confidence of an expected compromise, could not be given in evidence to his prejudice; but that, under such circumstances, the admission of a fact, such as the handwriting of the party which was not connected with the merits, might be received in evidence.

(*h*) *Slack v. Buchanan*, Peake's C. 5. *Gregory v. Howard*, 3 Esp. C. 113.

(*i*) *Smith v. Beadnall*, 1 Camp. 30. *Stockfleth v. De Tastet*, 4 Camp. 10.

(*k*) *Infra*.

(*l*) *Bauerman v. Radenius*, 7 T. R. 663. This was an action by the plaintiffs, who were the shippers of goods on behalf of Van Dycke & Co., against the defendants, for the damaging of goods in the course of the carriage; and the question was, whether a letter from the nominal plaintiffs, from which it appeared that Van Dycke & Co. were the real plaintiffs, and had indemnified them, could be read, in order to prove an admission that the defendants were wholly free from blame. The evidence was rejected upon the

an assigned bond, in whose name the action must necessarily be brought, is evidence to bar the action (*m*). And in an action by the consignor, of goods on behalf of the consignee, against the captain, it was held, that a letter written by the plaintiff was evidence (*n*).

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By a party to
the record.

But the admission by a guardian, although the plaintiff on record, is not evidence against the infant (*o*); nor can the answer of the guardian in chancery be read against the infant (*p*).

* In settlement cases, all declarations by rated parish- * 41
ioners are evidence against the parish, for they are parties to the cause (*q*). And it is not necessary to show previously that the party has refused to be examined (*r*).

So the admissions of the party really interested, although he be no party to the suit, are evidence; for the law, with a view to evidence, regards the real parties. Thus, in an action upon a bond, conditioned for the payment of money to *L. D.*, it was held, that the declaration of *L. D.* that the defendant owed nothing, was evi-

By party really interested.

trial; but the Court of K. B. were afterwards of opinion that the evidence ought to have been admitted, on the ground that the plaintiff in a cause must be considered as having an interest in the action; and Lawrence, J. observed, that he had looked into the books, and could not find one case in which it had been held that an admission by the plaintiff on record was not evidence, and that he had found none. See *Salk. 260. Payne v. Rogers*, Dougl. 407, where the tenant, a nominal plaintiff, having given a release to the defendant, the court ordered it to be given up on an application by the landlord. See *Craib v. D'Aeth*, 7 T. R. 670, in note. In Buller's N. P. 237, it is laid down, that the answers of a trustee can in no case be admitted as evidence of a *cestui que* trust.

(*m*) *Craib v. D'Aeth*, 7 T. R. 670, in the note.

(*n*) 7 T. R. 668. See note (*l*).

(*o*) *Eggleston v. Speke*, 3 Mod. 258. *Cowling v. Ely*, 2 Starkie's C. 366. Nor is the answer of the guardian evidence, *supra*. It was held by Lord Eldon, in *Davies v. Ridge*, 3 Esp. C. 101, that in an action against two trustees, an admission by one that he had trust property in his hands was not evidence of the fact against the other.

(*p*) *Eggleston v. Speke*, 3 Mod. 258. For by the opinion of the Court of K. B., consulted by the Judges of C. B., upon a trial at bar, the answer of the guardian is but to bring the infant into court. See Carth. 79; 2 Vent. 72; Prec. Ch. 229; 3 Bac. Ab. 148; 3 Bro. P. C. 1.

(*q*) *R. v. Whitley Lower*, 1 M. & S. 636; 11 East, 578. *R. v. Woburn*, 10 East, 395, 402. And therefore a rated inhabitant could not be examined by the adverse party. But now see the stat. 54 Geo. III, c. 170.

(*r*) 1 M. & S. 636.

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- dence for him (*s*). So the declaration by the under-sheriff, in matters relating to the execution of the office, is evidence against the sheriff, since he is the responsible person (*t*). So it is where the party really interested indemnifies the sheriff (*u*). So in actions upon policies (*x*), the declarations of the parties really interested are admissible. So, in an action by the master for freight, is the declaration of * the ship-owner (*y*), where the action is brought for his benefit. So where the party in the action is indemnified by another, as when the sheriff is indemnified by a third person, the declarations of that person are evidence against the sheriff (*z*).

Parties, third persons.

An admission or declaration by a third person is, upon principles already adverted to, in general inadmissible. It ceases to be so, where the party making such admission or declaration can be considered as identical in interest and authority with the other, or to be his mere instrument or agent; since, if a man authorize another to

- (*s*) *Hanson v. Parker*, 1 Wils. 257. A declaration by the party under whom a defendant in replevin makes cognizance, is not evidence for the plaintiff, for the party may be called; *Hart v. Horne*, 2 Camp. 92; see *Harrison v. Vallance*, 1 Bing. 45. where in trover for a deed, the declaration of the party at whose request the defendant admitted that he detained the deed, was held to be evidence for the plaintiff. The declaration of an individual corporator is not evidence against the corporation who defend; *Mayor of London, &c. v. Long*, 1 Camp. 22; *Mayor of London v. Jolliffe*, 2 Keb. 295; *Lord Dorset v. Carter*, 3 Keb. 300; *R. v. City of London*, 1 Vent. 351; 2 Lev. 231; 1 Vent. 254; 2 Vern. 351, *Vide etiam*, *Dyke v. Aldridge*, 11 East, 584. n. 7 T. R. 665.

In an action by the indorsee of a bill of exchange against the acceptor, the defendant proved that the plaintiff held the bill as indorsee from the payee for a purpose which had been satisfied, but the Court held that this did not warrant the reception of declarations made by the payee subsequent to the indorsement, to show that the bill had been accepted without consideration, K. B. Trin. T. 1824.

(*t*) *Yabsley v. Doble*, Lord Raym. 190.

(*u*) *Dowden v. Fowle*, 4 Camp. 38; *Young v. Smith*, 6 Esp. 121.

(*x*) In *Bell v. Ansley*, 16 East, 143, Lord Ellenborough observed, though an action on a policy may be brought in the name of the person who effected it, though he be not the person actually interested, yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are received as admissible evidence against the plaintiff, and what would be a defence against them would, in many instances, be a defence against the plaintiff.

(*y*) 3 Camp. 465.

(*z*) *Dyke v. Aldridge*, Cor. Lord Mansfield, cited in *Baerman v. Radenius*, 7 T. R. 665.

make a declaration, it is the same thing in reason and in law as if he had said it himself (*w*).

Where a party refers to another for an answer on a particular subject, the answer is, in general, evidence against him, since he makes him his accredited agent for the purpose of giving the answer. The defendant, in an action for goods sold and delivered, said, if *Coomes* will say that he did deliver the goods, I will pay for them. Upon the trial it was proved that *Coomes*, on application to him, did say that he had delivered the goods, and the evidence was held to be admissible (*a*). So where an executor referred a creditor of the testator to *J. S.* for information, concerning the effects of the testator, it was held that an admission of assets by *J. S.* was conclusive upon the subject (*b*). So, in general, what an agent says, who is employed by another to make a proposal for him, is also evidence against the latter (*c*). So an admission * by an agent, in the course of transacting the business which he * 43

(*w*) *A.* agrees to admit a claim if *J. S.* will make an affidavit in support of it, the affidavit of *J. S.* is conclusive, *Lloyd v. Willan*, 1 Esp. C. 178. So where *A.* having received a forged note from *B.*, returns it to him, and *B.* refers *A.* to *C.*, from whom he himself took it, for information, what *C.* says on the subject is evidence. [See *Delestine v. Greenland*, 1 Bay, 453.]

To prove a forfeiture by underletting, declarations of persons found in possession were admitted in evidence against the lessee; *Doe d. Hindley v. Rickarby*, 5 Esp. C. 4; Cor. Lord Alvanley; *sed quare*.

An admission by a proprietor or an occupier possessing an interest, is frequently evidence as to the nature and extent of the interest, especially if it be connected with any act relating to the enjoyment. An admission by a former occupier of a tenement, in respect of which, common is claimed, is evidence to negative the existence of the right, though the tenant be alive; *Walker v. Broadstock*, 1 Esp. C. 458; and see *Doe d. Human v. Pettett*, *supra*, Part II. p. 288. 307. 325; and *Ivat v. Finch*, 1 Taunt. 141, *supra*, Part II. p. 325. *Baggaley v. Jones*, 1 Camp. 367; *supra*, Part II. p. 325. But an admission made by one who takes a bankrupt's goods in execution, that he knew that an act of bankruptcy had been committed, is not evidence against one who takes the goods by assignment from the sheriff, the admission being subsequent to the assignment, *Deady v. Harrison*, 1 Starkie's C. 60; and as to a declaration by the holder of a negotiable security, see *Duckham v. Wallis*, 5 Esp. C. 251, *infra*. post. 298.

(*a*) *Daniel v. Pitt*, 1 Camp. 366, in note, Cor. Ld. Ellenborough. [6 Esp. 74, S. C.]

(*b*) *Williams v. Innes*, 1 Camp. 364.

(*c*) *Gainsford v. Grammar*, 2 Camp. 9; and where the agent was the attorney employed by the party, an authority for making the proposal was presumed, *Ibid*.

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is appointed to perform by the principal, is, in general, evidence against the principal (*d*). But, in such case, it is necessary to prove the authority, either expressly, or impliedly, as by showing what the usual mode of dealing has been (*e*); for an agent cannot bind his principal, either by act or declaration, beyond the scope of his authority (*f*).

But it seems to be a general rule, that what an agent does or says within the scope of his authority, is binding upon the principal, whose instrument he is; so that not only an agreement made by an agent is binding upon the principal, but so are all the declarations of the agent at the time, which in any manner affect or qualify the nature of the agreement (*g*); but what the agent says at another time, and of his own authority, is not evidence against the principal.

The act or admission of an under-sheriff is, in general, obligatory upon his principal, the sheriff, because he is notoriously the agent of the sheriff for transacting all that appertains to the office, and he indemnifies the sheriff, and consequently by his admission charges himself (*h*); but the authority of a bailiff, who is not the general officer of the sheriff, must be proved in every particular case, and then his declarations in the course of his agency are evidence (*i*).

* 44 * In *Biggs v. Lawrence* (*k*), it was held at *Nisi Prius* (*l*), that where *A.* had ordered goods of *B.*, to be delivered to *C.*, an acknowledgment in the hand-writing of *C.*, of the delivery, was evidence against *A.* (*m*). But the same point

(*d*) For the cases relating to this point, and the various distinctions upon the subject, see tit. *Agent*.

(*e*) Ibid. And see 7 T. R. 668.

(*f*) *Fenn v. Harrison*, 3 T. R. 757.

(*g*) See *Agent*. And see *Palethorp v. Furnish*, 2 Esp. C. 511. *n.* *Helyear v. Hawke*, 5 Esp. 74; [and Mr. Day's note to that case, and also his note to *Masters v. Abraham*, 1 Esp. C. 375.] *Peto v. Hague*, 5 Esp. C. 135; *Alexander v. Gibson*, 2 Camp. 555.

(*h*) *Yabsley v. Doble*, Lord Raym. 190.

(*i*) *North v. Miles*, 1 Camp. 389. *Bowsher v. Calley*, 1 Camp. 391. *n.* See tit. *Sheriff*.

(*k*) 3 T. R. 454.

(*l*) By Buller, J.

(*m*) The case is wrongly abstracted in the marginal note, 3 T. R. 454; the agent was not employed to buy goods. Qu. whether the receipt was given at the time of the delivery. In the case of *Fairlie v. Hastings*, 10 Ves. jun. this point was treated by the Master of the Rolls as a very material one. It is difficult to conceive how any authority to a person to receive goods for another can make the mere admission of the latter evidence against the owner. No such authority is necessarily to be implied, nor will the fact that it was

was frequently ruled differently by Lord Kenyon (*n*) ; and the case was afterwards decided upon another ground, viz. the illegality of the contract.

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A community of interest or design, will frequently make the declaration of one the declaration of all. Thus in the case where partners, or others, possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject matter, is evidence against the rest (*o*). The admission of one of several makers of a joint and several promissory note, that it * has not been paid, is evidence against all (*p*). Such an admission, however, ought to be clear and unequivocal. * 45

By third person.

A declaration by one partner, concerning a subject of joint interest, is evidence against another, although the former be no party to the suit. Thus in an action against some of the members of a firm, the answer of another person, proved to be a partner, was admitted in evidence as an admission against all (*q*). (1) Partner.

An admission by one partner, after the dissolution of the co-partnership, is evidence to charge the other part-

made against the interest of the party receiving, make his receipt or declaration evidence, where his testimony may be had ; neither, as it seems, will the circumstance that the receipt was given at the time of delivery, make any material difference in principle, for such evidence would be admitted not to explain the nature of a particular fact known to have occurred, but to prove the existence of the act itself.

(*n*) See 7 T. R. 668 ; Dougl. 751.

(*o*) 11 East, 589, per Le Blanc, J. Where a suit is pending against a great number of persons who have a common interest in the decision, a declaration made by one of those persons concerning a material fact within his knowledge, is evidence against him and all the other parties to the suit. See tit. *Abatement* ; *Lucas and others v. De la Cour*, 1 M. & S. 249.

(*p*) *Whitcomb v. Whiting*, Dougl. 652. [See observations of Lord Ellenborough, in *Brandram v. Wharton*, 1 B. & A. 467, 8.]

(*q*) *Wood v. Braddick*, 1 Taunt. 104. *Grant v. Jackson*, Peake's C. 203. *Nichols v. Dowding*, Starkie's C. 81.

(1) [In an action against A. B. & C. as partners, evidence of the declarations of A. is admissible to prove him a partner, but not to prove B. to be a partner. *Whitney v. Ferris*, 10 Johns. 66. But to support a plea of A. and B., sued as partners, that the promise was made, if at all, by them jointly with C.—the declarations of A. and B. or of C. are not admissible evidence. *Sweeting v. Turner*, 10 Johns. 216. *S. P. Corp v. Robinson*, MS. Wharton's Digest, 249.]

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ner (*r*) (1) ; but a declaration made by one of two partners during an existing co-partnership is not evidence to bind his partner as to a transaction which occurred previous to the partnership (*s*), unless a joint responsibility be proved as a foundation for such evidence (*t*). So a declaration made by one partner, that he contracted on his own sole account, is evidence against all the parties, to the preclusion of their joint action (*u*) (*v*).

In an action of covenant against two, it was held, that the voluntary affidavit of one, upon a subject in which he was jointly interested with the other, was evidence against the other (*x*).

But notwithstanding the community of interest, the declaration of the wife will not, in general, bind the husband. Even in an action by the husband and wife, in right of the wife as executrix, her declaration * will not be evidence (*y*). So where wages had been earned by the wife, it was held that her admission of the receipt of 20*l.* was not evidence against the husband (*z*). So an admission by the wife, of a trespass, cannot bind the husband (*a*). So the answer of the wife in equity cannot be read against the husband (*b*) ; for the wife is not, in general, considered to be invested with power to act for her husband, and consequently to bind him by her declarations. But where the authority of the wife to act as agent to her husband can be presumed, her declarations are like those of any other agent ; accordingly the admission of the wife, as to an agreement for suckling a child, was held to be evidence (*c*) against him.

By a wife,

(*r*) *Wood v. Braddick*, 1 Taunt. 104.

(*s*) *Catt v. Howard*, Guildhall Sittings after Hil. T. 1820, Cor. Abbott, L. C. J.

(*t*) *Ibid.*

(*u*) *Lucas v. De la Cour*, 1 M. & S. 249,

(*v*) An admission by a co-part-owner of a ship does not bind another part-owner. *Jaggers v. Binnings*, 1 Starkie's C. 64.

(*x*) *Vicary's case*, Bac. Ab. Ev. 623.

(*y*) *Alban and others v. Pritchett*, 6 T. R. 680,

(*z*) *Hall v. Hill*, Str. 1094 ; Bac. Ab. Ev. 622.

(*a*) 7 T. R. 112. [*Hawkins v. Hatton*, 2 Nott & M'Cord, 374.]

(*b*) 3 P. Wms. 238.

(*c*) Str. 527. See also *Emerson v. Blonden*, 1 Esp. C. 141, and

(1) [In New York, it is held that one partner cannot, after a dissolution, bind his co-partner by acknowledging an account, any more than he can give a promissory note to bind him. *Hackley v. Patrick & al.* 3 Johns. 536. *Watson & al. v. Sherburne & al.* 15 Johns. 424. So in Kentucky. *Walker v. Duberry*, 1 Marsh. 189.]

So where an action was brought by the direction of the wife, in the name of her husband, to recover a sum of money which had been taken from her, on suspicion that it was the produce of stolen property, it was held, that what she had said (in the absence of the husband) respecting the money, when examined on a charge of being concerned in the robbery, was evidence for the defendant (*d*). So in an action against the husband for goods sold to his wife (*e*) during the time when he occasionally visited her, it was held, that a letter subsequently *written by the wife, acknowledging the debt, was evidence. (1) * 47

The rule, that where there is a community of interest and design, the declaration of one of the parties is evidence against the rest, is not confined to cases of civil contract. It is indeed true, that in general the declaration or admission of one trespasser, or other wrong-doer, is not evidence to affect any other person, for it is merely *res inter alios*; but where it has once been established, that several persons have entered into the same criminal design, with a view to its accomplishment, the acts or declarations of any one of them in furtherance of the general object are no longer to be considered as *res inter alios* with respect to the rest; they are identified with each other in the prosecution of the scheme; they are partners for a bad purpose, and as much mutually responsible, as to such purpose, as partners in trade are for more honest pursuits, and may be considered as mutual agents for each other. Where an unity of design and purpose has once been established in evidence, it may fairly and reasonably be presumed that the declarations and admissions of any one, with a view to the prosecution and accomplishment of that purpose, convey the intentions and meaning of all (*f*). And this seems

Where there is
a community of
design.

infra, tit. *Agent*; and *Anderson v. Sanderson*, 2 Starkie's C. 204, where the admission of the wife as to a sum due for articles supplied to the shop, of which she had the sole management, was received. [See also *Spencer v. Tisue*, Addison's Rep. 319. *Hughes v. Stokes*, 1 Hayw. 372. *Fenner v. Lewis*, 10 Johns. 38.]

(*d*) *Carey v. Adkins*, 4 Camp. 92. In an action for seducing the wife, her declarations are not evidence on either side, *Winsmore v. Greenbank*, Willes, 577; and see tit. *Criminal Conversation*, p. 438. In an action for goods sold and delivered, the declarations of the defendant's wife, who served in the shop and conducted the business, are admissible, *Clifford v. Barton*, 1 Bingh. 199.

(*e*) *Palethorpe v. Furnish*, 2 Esp. C. 511; 5 Esp. 145. *Gregory v. Parker*, 1 Camp. 594.

(*f*) See Lord Ellenborough's observations, 11 East, 584, *infra*, tit. *Trespass*.

(1) [See post, 57. note (1).]

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to be the general rule, in case of trials for conspiracies, and other crimes of a like nature (*f*).

An admission by the party represented is usually admissible in evidence against the representative (*g*).

* 48 * An admission by the owner is sometimes evidence against one who claims title through him (*o*).

An admission by the debtor is evidence against the sheriff, in an action for a false return or escape (*p*) ; but this is by reason of the sheriff's misconduct.

An admission by the principal is not evidence against his surety on a contract (*h*).

It is a general rule with respect to admissions, as indeed in all other cases, where an entry or declaration is entire, and one part is capable of being explained and qualified by another, that the whole is to be taken as evidence (*i*). (1) What credit is to be given to the whole, or part, is a question for the consideration and discretion of the jury ; and therefore, where a party has admitted the claim made by another, but at the same time has made a counter-claim, his statement of a counter-claim is evidence to be left to the Jury, as to the existence of such counter-claim (*k*).

Confessions in
criminal cases.

A confession, where it is voluntary, is one of the strongest proofs of guilt, for it cannot be supposed that a person

(*f*) See tit. *Conspiracy*. And see tit. *Bankrupt*.

(*g*) See *Executor.—Bankrupt*.—An admission made by a bankrupt before his bankruptcy, is evidence to charge his estate with a debt. 5 T. R. 513. *Secus*, as to subsequent admissions. So admissions made by an insolvent subsequent to his insolvency, are not admissible against the trustees of his estate. *Smith v. Simmes*, 1 Esp. C. 330.

(*o*) See *Ivat v. Finch*, 1 Taunt. 141. Part II. 193. 240 ; Post, tit. *Quo Warranto*. See *Walker v. Broadstock*, 1 Esp. C. 458. *Secus*, in the case of a negotiable instrument, post, 299.

(*p*) *Infra*, tit. *Sheriff*. See tit. *Res Inter Alios* ; and see Part II. 325.

(*h*) *Infra*, tit. *Surety*, 1386. *Hart v. Horn*, 2 Camp. 92. *Replevin*.

(*i*) *Randle v. Blackburn*, 5 Taunt. 245. *Smith v. Young*, 1 Camp. 439. *Jacob v. Lindsay*, 1 East, 462. *Barrymore v. Taylor*, 1 Esp. C. 325. *Green v. Dunn*, 3 Camp. 215. n. And see *supra* ; and 2 Vent. 171 ; Com. Dig. *Evidence*, B. 5. [*Newman v. Bradley*, 1 Dallas, 240. *Farrel v. McClea*, *ibid.* 392. *Carver v. Tracy*, 3 Johns. 427. *Fenner v. Lewis*, 10 Johns. 38. *Wailing v. Toll*, 9 Johns. 141.]

(*k*) *Randle v. Blackburn*, 5 Taunt. 245. *Vide* Part II. 292, 293.

(1) [But what a party to a cause had said at one time, cannot be given in evidence by himself, to explain what he has said at a former time, which the other party has given in evidence, *Blight v. Ashley & al.* 1 Peters' Rep. 15.]

really innocent would *voluntarily* subject himself to infamy and punishment. Many of the rules applicable to admissions in civil cases are applicable to those in criminal proceedings, but there are some which are peculiar to the latter (*l*).

A confession must never be received in evidence, where the defendant has been influenced by *any* * threat or promise (*m*). To say that it will be better for him if he will confess, or worse if he will not, is sufficient to exclude the consequent declaration by the prisoner, for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration, if *any* degree of influence has been exerted. And where a confession has once been induced by such means, all subsequent admissions of the same, or of the like facts, must be rejected, for they may have resulted from the same influence (*s*).

* 49

Upon the trial of Hall, for burglary, proof was offered that the prisoner had desired Last to apply to the justice to admit him as a witness for the crown; but the evidence of such request was rejected, on the ground that it had been made under the hope of being admitted king's evidence, and could not be considered as voluntary (*n*). This case goes to a very great length. Where hopes had been held out to a prisoner to confess, and when brought before a magistrate he refused to confess, except upon conditions, Buller, J. admitted the general rule, with some qualifications, observing, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account; and that it ought most clearly to appear that the prisoner understood such warning, before his subsequent confession could be given in evidence (*o*). And in a similar case, before * Mr. J. Bayley, * 50 where the prisoner had been told by the constable's assistant that it would be better for him to confess, but the magistrate cautioned him frequently to say nothing against

(*l*) As to the effect of confessions in cases of treason, see *Treason*.

(*m*) *Warrickshall's* case, Leach's C. C. L. 3d edit. 298; Cowp. 334; 2 Haw. c. 46, s. 36. Two men were charged with the murder of one who (as it afterwards appeared) was still living, and yet one of them, upon a promise of pardon, confessed himself to be guilty of the crime. Note to *Warrickshall's* case, Leach's C. C. L. 301, 3d edit. And an instance is mentioned in the State Trials, where not only the party himself, but his brother, were executed on a supposed confession, although all the parties were innocent.

(*s*) So held in *R. v. White*, Mich. T. 1800. MS.

(*n*) By Adair, Serj. at the O. B. Leach's C. 636.

(*o*) *East's* P. C. 658.

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this would be a species of duress, and a violation of the maxim, that no one is bound to criminate himself. And where the examination purported on the face of the magistrate's return to have been taken upon oath, the judge rejected parol evidence to show that no oath had in fact been taken (*g*).

Proof.

In *Lambe's* case (*h*), it was held by a majority of the twelve judges, that a confession made by the prisoner before a magistrate might be read in evidence, upon proof, that when it was read over to the prisoner he said it was *all true* enough, although he declined to sign it, and although it had not been signed by the magistrate; for even a parol confession was evidence at common law before the statutes of Philip & Mary. (1) But where a prisoner, after his examination had been taken down in writing refused to sign it, and did not say, as in *Lambe's* case, that it was true, the evidence was rejected (*i*).

* 53

By the statutes of Philip & Mary, the examinations * must be returned to the next general gaol delivery, to be held within the limits of their commission. The identity of the examination (*k*) ought to be proved by the magistrate,

597, Cor. Richards, C. B. the prisoner's statement was, on this ground, rejected as inadmissible; but by the statute of Philip and Mary the magistrate is to take the *examination* of the prisoner; and in a very late case, Carlisle, Sp. Ass. 1824, Holroyd, J. admitted the prisoner's examination to be used as evidence against him, notwithstanding this objection. Where a statement by a defendant, made before a Committee of the House of Commons, was objected to on the ground that the statement had been made under a compulsory process, the objection was overruled, *R. v. Mercer*, 2 Starkie's C. 366.

(*g*) *R. v. Smith* and another, Cor. Le Blanc, J. 1 Starkie's C. 242. In a case, *R. v. Wilson*, 1 Holt, C. 597, Cor. Richards, L.C.B. it was held, that an examination of a prisoner, which consisted in answers put by the magistrate, could not be received in evidence, although no threats had been held out.

(*h*) Leach's C. C. L. 625; and see 2 Haw. c. 46, s. 31. The same in *Layer's* case, 6 St. Tr. 229. [*S. P. Pennsylvania v. Stoops*, Addison's Rep. 383.]

(*i*) By Wood, B. York Summer Assizes, 1819. *R. v. Telicote*, 2 Stark. C. 483. In such a case the refusal to sign the examination affords a presumption that it has been incorrectly taken down. Minutes of a prisoner's examination, which have not been signed by him, or read over to him, may be used as minutes to refresh the memory of the witness; *Layer's* case, 24 Howell's St. Tr. 214.

(*k*) It has been said that the examinations ought not to be taken

(1) [In North Carolina, a confession made before a justice may be given in evidence, although by parol and not reduced to writing. *State v. Irwin*, 1 Hayw. 112.]

coroner, or his clerk, who took it down, and it must be shown that it contains the *substance* of what the prisoner said (*l*). It should also appear that the confession was made freely (*m*); but it is not absolutely incumbent on the magistrate to warn the prisoner not to confess (*n*). The whole of the confession must be read (*o*).

A prisoner may be convicted upon his own confession, without other evidence (*p*). Force and effect.

It is a general rule, founded upon principles already adverted to (*q*), that the admission or confession of one defendant is not evidence against any but himself (*r*), (1), except indeed such a privity and community in the same original design be proved, as to render that which has been said or done by one, in furtherance of the common object, fair and reasonable evidence of the general design and project itself. It was ruled in *Tong's case* (*s*), upon the soundest principles, that the * confession of one shall not be evidence against another. Where several are tried at the same time, and the confession of one implicates another, the evidence cannot on that account be rejected; the usual course is for the court to inform the jury that the confession is evidence against that party only by whom it is made (*t*). In some instances, the confession of one, taken in the presence and hearing of another prisoner, may

before the Grand Jury, *Gilb. Ev. by Loft*, 216; but the rule seems to apply to depositions only; and, in practice, the examinations are frequently (by leave of the court,) taken before the Grand Jury.

(*l*) 1 Hale, 284. The safest course is to take down the very words. The statute requires the justices to take the examination, or so much thereof as is material.

(*m*) 1 H. P. C. 284.

(*n*) *R. v. Magill*, *Macnally* 38.

(*o*) *R. v. Payne*, 5 Mod. 165; 2 Haw. c. 46, s. 42.

(*p*) *Stone's case*, Dy. 214; *Francis's C.* 6 St. Tr. 58; *Fisher's case*, *Leach's C. C. L.* 3d edit. 349; *Wheeler's*, *Ib.*

(*q*) Part IV. p. 47.

(*r*) 2 Haw. c. 46. The contrary was unjustly ruled in *Throgmorton's case*, 1 St. Tr. 70; *Earl of Essex's case*, *Ib.* 197; and *Sir Walter Raleigh's case*, 1 Jac. 1.

(*s*) *Kel.* 18, *res.* 5.

(*t*) See the observations of Wood, B. in *Bullen v. Michell*, 2 Price, 299. It is however morally impossible that the hearing of such a confession should not operate to the prejudice of the parties implicated; in some instances the inconvenience might be obviated by separate trials.

(1) [See *Low v. Botcher*, 4 Har. & M'Hen. 346.]

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be very material evidence to explain the expressions and conduct of the latter upon that occasion ; for any declarations of his, by which he assented to what was confessed by another, to his own prejudice, would be admissible evidence against him. The confession of the other may also be evidence for the purpose of explaining such declarations. (u)

ADMISSION TO A COPYHOLD. See *Copyhold—Ejectment—Title*.

ADULTERY. See *Criminal Conversation*.

AGENT (a).

* 55 If *A.* authorize or direct *B.* to do an act, it is in law the act of *A.*, and may be so alleged in pleading, except in cases of felony ; for then, if *A.* be absent when the fact is committed, he is but an accessory before the fact (*b*). Accordingly, on an allegation that the master and servant drove ungovernable horses in Lincoln's-inn-fields. both were found guilty, although * the servant alone was present (*c*). So an allegation that the defendant negligently drove his cart, is supported by proof that it was driven by his servant (*d*). Before the act of *B.* can be given in evidence as the act of *A.*, it must be proved that *B.* was the agent of *A.* This proof may either be,—1st. direct, or it may result, 2ndly, from the relative situation of *A.* and *B.* ; or, 3rdly, from their habit and course of dealing ; or, 4thly, from *A.*'s recognition of *B.*'s act, or his acquiescence in it. 1st. May be *direct*. As where the agent is called as a witness, and proves that he was authorized to do the act, or transact the particular business. If the authority was in writing, it must be produced, in order that it may be seen

Direct evidence of agency.

(u) A confession by one of several prisoners before a magistrate, which implicates all, cannot be read in evidence for the purpose of drawing an inference from their silence as to the parts which affect them ; *R. v. Appleby and others*, 3 Starkie's C. 33, Cor. Holroyd, J. who said that it had been so held by several of the Judges on a case from Chester, and that he was of that opinion.

(a) For other evidence on this head, see tit. *Admissions, Principals and Accessories*.

(b) See *Accessory*.

(c) *Michael v. Allestree*, 2 Lev. 172.

(d) *Breecher v. Fromont*, 6 T. R. 659 ; and see *Tuberville v. Stamp*, Ld. Raym. 264.

whether it has been pursued (*d*). If he acted under a power of attorney, the instrument must be produced and proved (*e*). And parol evidence of the authority is inadmissible where the authority from its nature must have been in writing (*f*). This, however, does not appear to be necessary, where the authority can be clearly inferred from the course of dealing, or from the recognition of the agent's acts by the principal. And, therefore, in the case of *The King v. Bigg* (*g*), which was an indictment for a felonious erasure of an indorsement upon a bank-note, although it was contended, on behalf of the prisoner, that it was necessary to prove the appointment of *Adams* as the agent of the Bank of England, being a corporate body, under their seal (*h*); * it was held to be sufficient to show that *Adams* * 56 had been used to sign bills and notes, which from time to time had been duly paid and answered by the Bank. It was found by the special verdict that *Adams* had been intrusted and employed by the Governor and Company, but not by any instrument under their seal. A majority of the judges were of opinion that the evidence was sufficient, and the prisoner was transported.

Secondly. From relative Situation.—Where the authority results from *situation*, it is sufficient to prove such relative situation of the parties (*i*). Thus, to affect the sheriff with the act of the under-sheriff, it is unnecessary to show more than that the latter is the under-sheriff (*k*). But a bailiff is not the general officer of the sheriff, and therefore, the particular authority must be proved (*l*). Proof of the sale of a book by a servant in a bookseller's shop, is *prima facie* evidence of a sale by the master (*m*). Where the captain of a vessel orders goods for the use of the ship, the owners are responsible (*n*). So it is the common course,

From the relative situation of the parties.

(*d*) *Johnson v. Mason*, 1 Esp. C. 89. *Coore v. Callaway*, Ib. 115.

(*e*) Ibid. [*Yarborough v. Beard*, 1 Taylor, 25. Sugd. Vend. 262.]

(*f*) Ibid; but see 3 P. Wms. 427, *R. v. Bigg*.

(*g*) 3 P. Wms. 427.

(*h*) It was alleged in the indictment, that one Joshua Adams was intrusted and employed by the Governor and Company of the Bank of England to sign bank-notes for the said company; and it was found by the special verdict that he was so intrusted and employed by the Governor, &c. *but not under their common seal*.

(*i*) See 7 T. R. 113.

(*k*) Ibid.

(*l*) Ibid.

(*m*) *R. v. Almon*, 5 Burr. 2686. See tit. *Label*.

(*n*) 1 T. R. 108; Qu. and so is the captain also; *aliter*, if they be ordered before his appointment, although not delivered till after,

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15.

upon trials at Nisi Prius, to read the admissions of the attorney on record of either of the parties. And a plaintiff is bound by the act, not only of his attorney, but of his agent in town (o), in the course of the cause.

* 57

From habit
and course of
dealing.

* *Thirdly. From habit, course of dealing, &c.*—In mercantile transactions, the fact of the usual and general employment of a particular agent in the transaction of business is the most usual evidence of authority (p). Thus, the general authority of brokers to sell, so as to bind their principals in respect of the purchase, is to be collected from their general dealings, and not merely from their private instructions as to the particular parcel of goods; and if a general authority can be inferred from the usual course and habit of dealing, the principal will be bound by the contract, although it be contrary to the particular instructions (q). Where an agent had been employed for a length of time to pay for work of a particular description, and workmen were always referred to him, his acknowledgment of a debt was held to be binding upon his principal (r). So where the defendant's wife usually gave orders for goods, her acknowledgment of a debt being due within six years, was held to be evidence against her husband (s). So where the wife had taken lodgings for herself and her husband, and afterwards gave notice of quitting, upon an action brought for use and occupation,

Farmer v. Davis, *ibid.* The course of the usual employment of a ship is evidence of an authority from the owner to the master; *Abbott*, O. S. 112, 122; 1 Vent. 190. 238. An assignment of a lease under a *fi. fa.* by *A. B.* as under-sheriff, is evidence that he is under-sheriff, *Doe d. James v. Brown*, 5 B. & A. 243. The drawing of bills by the consignor of goods, on the consignee or factor, against the consignment, does not authorize the latter to pledge the goods, *Gill v. Kymer*, 5 Moore, 518; *Duclos v. Ryland*, cited *ib.* See *Guichard v. Morgan*, 4 Moore, 36. *Paterson v. Gandasequi*, 15 East, 62. *Daubigny v. Duval*, 5 T. R. 604; *Fielding v. Kymer*, 2 B. & B. 639.

(o) *Griffiths v. Williams*, 1 T. R. 710, 711. See *Hayes v. Perkins*, 3 East, 568. See vol. i. p. 365, n. (k).

(p) See *R. v. Biggs*, 3 P. Wms. 427. A master, who in a single instance, authorizes his servant to take up goods on credit, is afterwards liable; *Hazard v. Tradwell*, Str. 506. Ship-owners are bound by contracts made in the course of the usual employment of the ship, *Abbott*, O. S. 122, per Lord Kenyon, in *Rinquer v. Ditchell*, Mich. 40 G. 3, cited *ib.* The usual course of employment is evidence of authority, *ib.*

(q) *Whitehead v. Tuckett*, 15 East, 400.

(r) *Burt v. Palmer*, 5 Esp. C. 145.

(s) *Palethorp v. Furnish*, 2 Esp. Cas. 511. n. See tit. *Admissions*, ante, p. 42, 43, 45, 46.

it was held, that the acknowledgment of the wife was evidence against her husband; and Lord Kenyon said, that where a wife acts for her husband in any business or department by his authority, and with his assent, he thereby adopts her acts, and must be bound by any acknowledgment, or any admission made by her respecting that business, in which she has acted for him (*t*). (1) In *such respects, the wife does not differ from any other agent. So an admission by a clerk usually employed in corresponding on business, is evidence (*u*). * 58

An authority to receive payment on bonds, bills, &c. is usually evidenced by the custody of the instruments themselves (*x*). And it was held, that a payment to one who usually received money for an obligee of a bond, was not sufficient, unless he had the custody of the bond (*y*).

Fourthly. A recognition by the principal of the agency in the particular instance, or in similar instances, is evidence of the authority to the latter. As, where one subscribes policies in the name of another, and upon a loss happening, the latter pays the amount: this would be evidence of a general authority to subscribe policies (*z*). So where the defendant's son had, in three or four instances, signed bills of exchange by the direction of his father, it was held to be sufficient evidence for presuming on authority from the father to the son to sign a guarantee (*a*). Recognition.

Mere evidence, however, that the agent has done acts in

(*t*) *Emerson v. Blonden*, 1 Esp. C. 142; and see *Anderson v. Sanderson*, 2 Starkie's C. 204. So where the wife kept a shop in the absence of the husband, and admitted a debt for goods sold and delivered; *Peto v. Hague*, 5 Esp. C. 134; *Clifford v. Burton*, 1 Bing. 199.

(*u*) *Harding v. Carter*, Park on Ins. 4.

(*x*) 1 Chan. Cas. 193. *Owen v. Barrow*, 1 N. R. 101; 12 Mod. 564. See tit. *Payment*.

(*y*) *Gerard v. Baker*, 1 Ch. Ca. 94; *Duke of Cleveland v. Dashwood*, 2 Eq. Cas. Ab. 709.

(*z*) *Courteen v. Touse*, 1 Camp. 43, n. (*a*). *Neal v. Irving*, 1 Esp. C. 61. *Haughton v. Eusbank*, 4 Camp. 88, although the agent acted under a power of attorney.

(*a*) *Watkins v. Vince*, 2 Starkie's C. 368.

(1) [Where husband and wife, by articles of agreement, covenanted to live separately, and A. executed the agreement as trustee and surety for the wife, and covenanted to pay to the husband a certain sum of money, on his delivering to the wife, for her separate use, a coach and horses, &c.—it was held, in an action by the husband against A. to recover the money, that evidence of the declarations and confessions of the wife, as to the delivery of the coach and horses, was admissible. *Fenner v. Lewis*, 10 Johns. 38.]

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the name of a principal, will not bind the latter without some evidence of recognition on his part ; and therefore, where a policy had been signed by one *Butler*, and it was proved that *Butler* had signed other policies in the name of the defendant, but no evidence of any authority in the particular case was given, nor any proof of the defendant's
 * 59 having ever paid a loss on * such policies, the evidence was held to be insufficient (b). (1). If an agent has authority to subscribe a policy he has also authority to adjust it (c).

Where the defendant in an action on a policy of insurance had used an affidavit, made by a third person, for the purpose of putting off the trial, it was held, that the statement in the affidavit, that the deponent had subscribed the policy on the behalf of the defendant, was admissible to prove the fact (d).

If a master send a servant to receive money, and the servant instead of money receives a bill, the master may, as soon as he knows it, dissent, and will not be bound by the payment ; but acquiescence, or a small matter, it was said, in the case of *Ward v. Evans* (e), will be proof of the master's consent, and that will make the act of the servant the act of the master. In *Thorold v. Smith* (f), the servant having been sent for money received a cheque, which he kept in his own hands, without the knowledge of his master (g), and upon the banker's failure, the servant sent back the bill, and Holt, Chief Justice, and Powell, J. seem to have been of opinion, that it was a question of fact for the jury, whether the servant, under the circumstances of the case, had authority from his master to receive bills instead of money ; and a new trial was granted for the purpose of ascertaining the fact (h).

Such presumptions and implications of authority are in

(b) *Courteen v. Touse*, 1 Camp. 43, n. (a.)

(c) *Richardson v. Anderson*, 1 Camp. 43, n. (a).

(d) *Johnson v. Ward*, 6 Esp. C. 48. See also 2 T. R. 189, in not. 2 Ld. Raym. 930. 11 Mod. 88.

(e) 2 Salk. 442. *Watkins v. Vince*, 2 Starkie's C. 368.

(f) 11 Mod. 87. Holt, 462.

(g) Qu.

(h) But Holt, C. J. intimated his opinion, that a jury at Guildhall would find payment by bill to be a good payment, according to the common practice of the city ; and Powell, J. said he supposed that the servant had received bills for his master, which was an authority for the purpose ; but that that was matter of evidence, being according to the common practice of the world.

(1) [See *Hoe & al. v. Oxley & al.* 1 Wash. 19. *Hopkins v. Blane*, 1 Call, 361.]

general applicable to civil cases only. Evidence * of a wilful trespass by the servant, will not show that the master is a trespasser, without express evidence that the act was done by his direction, for an authority to commit a trespass cannot be implied (*i*). But fraud will vitiate a contract, although the principal take no part in it, for he is civilly responsible for the acts of his agent (*k*). It is a general rule, that an agent cannot bind his principal by any act beyond the scope of the authority delegated to him (*l*). Where the fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal, whose mere instrument he is ; and then, whatever the agent says, within the scope of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself ; and it makes no difference whether the declaration be true or false, for they are just as binding upon the principal as if they had been actually made by him. But where the agent makes any declaration or representation, of his own, and not as the instrument of his master, that declaration will not be evidence, but the agent himself must be called (*m*) to prove any fact within his knowledge ; * consequently, a letter written by an agent to his principal of what he has done, being the representation of the

What declarations by an agent are admissible.

* 61

(*i*) *Macmanus v. Crickett*, 1 East, 106. 2 H. B. 443. See also *Harding v. Greening*, Holt's C. 531 ; and *R. v. Johnston*, 7 East, 65, *infra*, tit. *Libel*. [*Harris v. Nicholas*, 5 Munf. 483.]

(*k*) *Doe v. Martin*, 4 T. R. 39.

(*l*) *Fenn v. Harrison*, 3 T. R. 57. A factor cannot pledge the goods of his principal by indorsement of the bill of lading, or even by delivery of the goods themselves. *Newsom v. Thornton*, 6 East, 17. *Daubigny v. Duval*, 5 T. R. 604. *Graham v. Dyster*, 2 Starkie's C. 21. But the rule does not apply to a banker who pledges an indorsed negotiable security deposited in his hands. 1 Bos. & Pull. 648, 651.

(*m*) See *Kahl v. Jansen*, 4 Taunt. 565, and *Langhorn v. Allnutt*, 4 Taunt. 511. In the first of these cases the Chief J. observed, "when it is proved that *A.* is the agent of *B.*, whatever *A.* does or says, or writes, in the making of a contract, as agent of *B.*, is admissible in evidence, because it is part of the contract which he makes for *B.* and which therefore binds him, but it is not admissible as the agent's account of what passes." So also is *Masters v. Abraham*, (1 Esp. C. 375,) the question was, whether the defendant, the purchaser of goods, had agreed to find bags for the carriage of them ; according to the report of the case, the plaintiff offered in evidence the letter of the broker who sold the goods (being the plaintiff's own agent,) written to the plaintiff, saying that the bags would be ready by a certain day ; the broker was then in the box, and Ld. Kenyon

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agent to his principal of what he has done, is not admissible in evidence against the principal to prove the truth of the representation (*n*); for he is no longer the authorized instrument of the principal to bind him by such declarations (*1*).

So where the question was, whether the agent of the defendant had delivered to him a bond, alleged to have been made by the defendant to the plaintiff, it was held, by the Master of the Rolls, that the declaration by the agent that he had delivered the bond to the defendant, was not admissible evidence to prove the fact (*o*). But it is otherwise where the principal refers himself to his agent's declaration on a particular subject, or constitutes a party his general agent for conducting his business, for then a declaration or acknowledgment by the latter falls within the scope of his authority (*p*).

Defence by an agent.

* 62

An agent may generally repel an action against himself by proof that he acted on the footing of an * agent, and was so understood (*a*), unless he execute an instrument in his own name (*b*). A public officer trading on behalf of the public is not liable on contracts made by him in that capacity (*q*). One who contracts on behalf of government is not liable, although the contract be by deed (*r*). But if a person represent himself to be an agent for one who resides abroad, it seems that he is personally liable (*s*).

said, that he would admit evidence of what he had done on account of the defendant, but that it should be learned from himself, and not from his letter. See *Ashford v. Price*, 3 Starkie's C. 185; 1 D. & R. 48; where a declaration by the clerk of an attorney in taxing costs, that he would not charge extra costs, was held to be evidence against the principal.

(*n*) 4 Taunt. 511. *Ib.* 565, 663. As to admissions by an attorney, see tit. *Admissions*, ante, 31; and Vol. I. p. 365.

(*o*) *Fairlie v. Hastings*, 10 Ves. 128.

(*p*) *Vide supra*, p. 57.

(*a*) See *Vendor & Vendee*.

(*b*) *Appleton v. Binks*, 5 East, 148. See ante, 61, note (*m*).

(*q*) *Macbeath v. Haldimand*, 1 T. R. 172; *infra*, 1620.

(*r*) *Unwin v. Wolseley*, 1 T. R. 674.

(*s*) *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Burrell v. Jones*, 3 B. & A. 47. *Appleton v. Binks*, 5 East, 148.

(1) [See Mr. Day's notes to the cases of *Masters v. Abraham*, 1 Esp. C. 375, and *Helyear v. Hawke*, 5 Esp. C. 74. See also 5 Esp. C. 134. 1 Taunt. 398.]

So where a captain contracts for goods for the use of the ship (t).

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AGREEMENT. See ASSUMPSIT.

APOTHECARIES.

An apothecary, by the stat. 55 Geo. 3, c. 194, s. 21, must, in an action for business done, prove either that he practised (u) as an apothecary prior to or on the 5th day of August, 1815, or that he has duly obtained his certificate (x) from the master, wardens, and society of Apothecaries. In an action to recover penalties under the same act, sec. 20 (y), where the question was, whether the defendant had practised as an apothecary * previous to the 1st of August 1815, it was held, that the incapacity, proved on the defendant, to make up the prescriptions of physicians before that time, was cogent evidence to prove the negative (z), since the 5th section of the act describes it

(t) *Farmer v. Davis*, 1 T. R. 108. But if an agent covenant in his own name he will be personally bound, although he be described in the deed as covenanting on the part of another. *Appleton v. Binks*, 5 East, 147; *Wilks v. Back*, 2 East, 142; *White v. Cuyler*, 6 T. R. 176. And if he draw a bill in his own name he will be personally liable, although the plaintiff knew that he was merely an agent. *Leadbitter v. Farrow*, 5 M. & S. 345; *Thomas v. Bishop*, Str. 955. So where a solicitor undertakes in writing to pay rent on withdrawing a distress. *Burrell v. Jones*, 3 B. & A. 47. See Part IV. 1620.

(u) See *Wogan v. Somerville*, 7 Taunt. 401. It was there held that the house apothecary of an infirmary, who officiates in making up medicines for the patients, is a person practising within the statute.

(x) See *Sherwin v. Smith*, 1 Bing. 204. It was there held, that a certificate from the Court of Examiners was conclusive to show that the party had served an apprenticeship.

(y) See *The Apothecaries Company v. Roby*, 5 B. & A. 940. It was there held, that upon an information against the defendant, to recover penalties for practising, against the statute, it was necessary to show in defence that the defendant was in practice on the first day of August 1815, and that it was not sufficient to show that he was in practice on a previous day.

(z) *Farrington v. Clarke*, 2 Ch. C. T. M. 429. The agent had taken out letters of administration in India for his principal, who had obtained administration of the intestate's effects; and it was held that the agent could not refuse to pay over the assets to his principal, on the ground that others had obtained administration. *Ibid.* See also *Roberts v. Ogilby*, 9 Price, 269; *Dixon v. Hamond*, 2 B. & A. 310.

(z) *The Apothecaries Company v. Warburton*, 3 B. & A. 40.

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to be the duty of an apothecary to make up prescriptions for physicians.

APPLICATION OF PAYMENT. See tit. PAYMENT.

ARBITRATOR [may be called as a witness].
See tit. ADMISSION.

ARREST.

It must be proved that the arrest was by authority of the bailiff; but it is not necessary to show that he was actually present, or in sight, or within any precise distance (*w*). See tit. *Sheriff*.

ARSON.

To establish this offence it is essential to prove, *first*, the act of setting fire to and burning; *secondly*, the house, &c.; *thirdly*, of the person specified in the indictment; *fourthly*, with a felonious intent (*z*).

Act of setting
fire to.

* 64 *First. The act of setting fire to and burning.*—To constitute arson at common law, there must be an actual burning of the house, or of some part of it (*a*). And although the stat. 9 Geo. I. c. 22, uses the words “set fire to,” they do not enlarge the common law offence in this respect (*b*). It is necessary to prove that some part of the house was burnt. Upon an *indictment under that statute for burning an out-house, called a paper-mill, proof that a large quantity of paper drying in a loft of the mill had been set on fire, no part of the mill itself having been set on fire, was held to be insufficient (*c*). But it is not necessary to show that the whole was consumed (*d*) (1).

(*w*) *Blatch v. Archer*, Cowp. 65. As to an arrest within a privileged jurisdiction, see *Spinks v. Spinks*, 7 Taunt. 311. [Yelv. 29. c. note. 3 T. R. 735. 3 B. & A. 502.] If a sheriff arrest a defendant on one writ, he is arrested as to all writs then in the sheriff's office. Per Bayley, J., *Short v. Vansittart*, York, 1821.

(*z*) See the allegations, Stark. Criminal Pleadings, 417.

(*a*) 3 Inst. 66. 1 Hale, P. C. 568. East's P. C. 1020. 1 Haw. c. 39, s. 4. 2 Bl. Comm. 222.

(*b*) East's P. C. 1020. *R. v. Spalding*; *R. v. Breeme*; *R. v. Taylor*, Leach, 58.

(*c*) *R. v. Taylor*, Leach's C. C. L. 58.

(*d*) 3 Inst. 66. 1 Hale, 568. 1 Haw. c. 89, s. 4.

(1) [It is sufficient, if the fire is applied with a malicious intent,

The act may consist in the prisoner's burning his own house, if he do it with intent to burn the house of another, which is in consequence burnt, or even with a felonious intent to defraud an insurer (e).

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Secondly. The house, &c.—Arson, at common law, is an offence against the habitation, and therefore the house must be proved to be a dwelling-house (f). The offence at common law extends to the burning not only of the dwelling-house, but also of all out-houses which are parcel of the dwelling-house, although not adjoining to it, or under the same roof (g). In what cases an out-house is to be considered as part of the dwelling-house will be more fully considered in treating of the evidence in case of burglary. The burning of a barn, containing corn and hay, was felony at common law (h). A common gaol is a house, under the stat. 9 Geo. I. c. 22 (i) (1). An indictment under that statute, for burning an out-house, is sustained by proof of burning an out-house, although it be part of a dwelling-house (k); for it is still an out-house, and the *statute does not alter the nature of the crime, * 66 but only excludes the principal more clearly from clergy (l).

Thirdly. Ownership and possession.—The house is described, either as the house of a particular person specified in the indictment, or under the stat. 43 Geo. III. c. 58, is described to be in the possession of the prisoner, or of some other person. If it be described gene

(e) *R. v. Probert*, East's P. C. 1030; 6 St. Tr. 222. And see the stat. *infra*, p. 67.

(f) See Stark. Criminal Pleadings, 417, note (m).

(g) 1 Hale, P. C. 567, 570. Summ. 86. 3 Inst. 67, 69. 1 Haw. c. 39, s. 1, 2. 4 Bl. Comm. 221.

(h) East's P. C. 1020; and so (*semble*) was the burning of a barn simply.

(i) *R. v. Donovan*, Leach's C. C. L. 81.

(k) *R. v. North*, East's P. C. 1021.

(l) *R. v. Breeme*, East's P. C. 1021.

so as to take effect, however small a part is consumed. *Commonwealth v. Van Schaack*, 16 Mass. Rep. 105. *The People v. Butler*, 16 Johns. 203. *The People v. Cottrel & al.* 18 Johns. 120.]

(1) [A jail is an inhabited dwelling-house, within the statute of New York: But setting fire to it by a prisoner, merely for the purpose of effecting his escape, does not amount to the crime of arson. *The People v. Cottrel & al.* 18 Johns. 115. The burden of proof, however, is on the defendant, to show that it was no part of his intention to burn the jail. *Ibid.*]

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rally as the house of another, then, since arson is an offence immediately against the possession, the house must be proved to be in the possession of that person, *suo jure* (*m*). Hence if the house be alleged to be the house of another, and it appear that the prisoner was in possession of the house under a lease for years, it is not felony (*n*). So an indictment against a prisoner for burning his own house was bad (*o*) before the stat. 43 Geo. III. c. 58; but it is no defence that the prisoner resided in the house by sufferance, as a pauper, by permission of the overseers, without any interest of his own; for the possession in such case is in the overseers, by the occupation of the pauper (*p*). Where a widow, who was entitled to dower out of a house in the possession of a tenant, which had been mortgaged, her son, being entitled to the equity of redemption, procured another to burn the house, it was held that she was guilty as an accessory before the fact, * 66 since the possession was in the tenant * on behalf of her son; and her title to dower, supposing the tenant's interest to be out of the case, did not give her even a right of entry (*q*). And it seems, that even if the prisoner had been entitled to the inheritance, and the tenant had been in possession, she would have been guilty of felony (*r*). Since the offence is against the possession, it is essential to prove that person to be in possession who is alleged in the indictment to be the owner (*s*). In *Glandfield's* case (*t*), the premises (which were out-houses) were alleged to be the mother's. It appeared in evidence that they were the property of *Blanche Silk*, widow, the mother,

(*m*) East's P. C. 1022, 1033. See East's P. C. tit. Burglary.

(*n*) *R. v. Holmes*, Cro. Car. 376. W. Jones, 351. 1 Hale, P. C. 568. 3 Inst. 66. The authority of this case was questioned by Mr. J. Foster, who thought that the house might with propriety be considered the house of the landlord; and in *R. v. Breeme*, East's P. C. 1026, *Ld. Mansfield* said, that if *Holmes's* case had come again in question he should have been of a different opinion.

(*o*) *R. v. Spalding*, East's P. C. 1025. 4 Bl. Comm. 222, 3. *Poulter's* case, 11 Co. 29. *R. v. Scofield*, Cald. 397. East's P. C. 1028.

(*p*) *R. v. Gower*, East's P. C. 1027. Qu. whether in such case the pauper could have committed a burglary in the house.

(*q*) *R. v. Ann Course*, Foster, 113.

(*r*) *Ibid.*

(*s*) *R. v. Breeme*, Leach's C. C. L. 261. *R. v. Spalding*, *Ib.* 258; 11 Co. 29. *R. v. Holmes*, Cro. Car. 376. *Rickman's* case, East's P. C. 1034.

(*t*) East's P. C. 1034.

but that one part was occupied jointly by the mother and son, and the rest by the son alone, and the variance was held to be fatal. On an indictment against the prisoner for burning his own house, with intent to burn the house of *A. B.* in one count, and of *C. D.* in another count, it appeared that *A. B.*, the owner of the latter house, had let it to *C. D.* for ninety-nine years, who had let it to *E. F.* for one year, who had let it to *G. H.* for three months, and the variance was held to be fatal (*u*). The stat. 43 Geo. III. c. 58, makes it felony to set fire to any house, barn, granary, &c. whether in the party's own possession, or in the possession of another, with intent to injure or defraud any other person, or body corporate (*x*).

Fourthly. With a felonious intent, &c.—An indictment at common law alleges that the prisoner did the *act feloniously, wilfully, and maliciously (*y*). And although the words maliciously and wilfully are no part of the description of the offence under the stat. 9 Geo. I. c. 22, yet, in order to oust the offender of his clergy under that statute, it must appear that the act was wilful and malicious (*z*). If *A.* set fire to his own house, with intent to defraud the insurer, and the house of *B.* his neighbour be burnt in consequence, and it was likely that this circumstance would happen, *A.* is guilty of arson, since the common law connects the primary felonious intention with the immediate consequence (*a*). So if *A.*, intending to burn the house of

Felonious
intent.

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(*u*) *R. v. Pedley*, Cald. 218. Leach's C. C. L. 277. 1 Hale's P. C. 268. East's P. C. 1026.

(*x*) See Stark. Criminal Pleadings, 417.

(*y*) See Stark Criminal Plead. 417.

(*z*) 1 Hale's P. C. 567. 569. 3 Inst. 67. *Minton's case*, East's P. C. 1021. Ibid. 1033. Stark. Criminal Pl. 419, n. (*o*).

(*a*) *R. v. Isaac*, East's P. C. 1031. The prisoner was indicted for a misdemeanor in setting fire to his own house, whereby the neighbouring and contiguous dwelling-houses of other persons were endangered; and upon its appearing from the statement by counsel, that the act was done with intent to defraud the insurers, and that the adjoining houses were actually burnt, Buller, J. was of opinion that the misdemeanor was merged in the felony, and directed an acquittal. But *qu.* for at that time the burning a man's own house with intent to defraud an insurer was but a misdemeanor; there was therefore no primary felonious intent. The offence is now made felony by the express provision of the stat. 43 Geo. 3, c. 58, s. 1. In *Probert's case*, East's P. C. 1030, where the prisoner was indicted and convicted of a misdemeanor for having set fire to his own house, and thereby endangering contiguous houses, Grose J. said, on passing sentence, that if any of the contiguous houses had been actually burnt in consequence of the defendant's wilful and malicious act in setting fire to his own house, (which was proved to

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B., set fire to the house of *C.*, and burn it, this, for the same reason, would be evidence of a felonious intent to burn the house of *C.* (*b*), although the house of *B.* * escaped by some accident. So if *A.* procure *B.* to burn the house of *C.*, and he does it, and the fire extends to the house of *D.* and burns it, *A.* is accessory to burning the house of *D.* (*c*). But if it appear that the house of the prosecutor was burnt by the negligence of the prisoner, however gross, or by accident, or even by his committing an unlawful act, which does not amount to a felony, the burning will not amount to arson. As, where an unqualified person, shooting at game, sets fire to the thatch of a house; or where a person is committing a trespass, by shooting at the poultry of another (*d*), provided he did not mean to steal them. Where the intent is laid to defraud the insurer, the books of the insurance company are not evidence without notice to produce the policy (*e*). Where the prisoner's goods, in a particular house, had been insured, and a memorandum had been indorsed on the policy, stating that the insured goods had been removed to another house, and the policy had been properly stamped, but the memorandum had no new stamp; on the trial of the prisoner for setting the latter house on fire, it was objected that the memorandum could not legally be received in evidence for want of a stamp. The case was argued before the twelve judges, and the prisoner was afterwards discharged (*f*). Where the indictment is framed under the stat. 43 Geo. III. c. 58, s. 1, the act of wilfully burning the property carries within itself sufficient evidence of an intention to injure the owner, without proof of any other act which indicates malice (*g*); although * the principal

have been done in order to cheat the insurance-office,) it would clearly have amounted to a capital felony.

(*b*) 1 Hale, 569. 3 Inst. 67. 1 Haw. c. 39, s. 5. East's P. C. 1019.

(*c*) Plowden, 475. East's P. C. 1019.

(*d*) 1 Hale, 569. 3 Inst. 67. 1 Haw. c. 39, s. 5. East's P. C. 1019.

(*e*) *R. v. Doran*, Cor. Kenyon, C. J. 1 Esp. C. 127.

(*f*) *R. v. Gillson*, 2 Leach, 1007, 4th edit. 1 Taunt. 95. Phillips on Evidence, 457. 3d ed.

(*g*) *Farrington's case*, Russell, 1674. The fact of the prisoner having set his master's mill on fire was clearly proved by his own confession; but it appeared that he was in other respects a harmless inoffensive man, and that he had never had any quarrel with his masters. After conviction, sentence was respited to take the opinion of the Judges upon this clause of the statute; and they

object of the statute was to comprise the cases of a person burning a house of which he was tenant or owner, to the injury of his landlord or neighbour, or to defraud the insurers (h).

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General Evidence.—In *Rickman's* case (i), evidence was adduced that a bed and blankets, which had been taken from the house at the time of the fire, had been in the possession of the prisoners, and had been concealed by them from that time. Buller, J. doubted at first whether such evidence of another felony could be admitted in support of this charge; but, as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, the evidence was admitted. The evidence to prove this offence, as in other cases, resolves itself into the probable motives of the prisoner, his opportunity and means of committing the offence, and his conduct. Where the prisoner is charged with setting fire to his own house, with intent to defraud the insurer, the value of the property, as compared with the amount insured, obviously becomes a question of great importance, in order to establish or repel the inference of motive.

General
evidence.

A *variance* from the ownership, as laid in the indictment, is fatal (k). Upon a charge of burning an out-house the prisoner may be convicted, although it appear that the out-house was part of a dwelling-house (l). * An allegation that the offence was committed in the night-time need not be proved (m).

Variance.

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ASSAULT AND BATTERY.

For the evidence in an action for an assault and battery, see *Trespass*.

An indictment for an assault is supported by evidence of an attempt, with force and violence, to do a corporal hurt to

Evidence upon
an indictment.

held the conviction to be proper, since the burning of the mill must, under the circumstances, have been done with an intention to injure.

(h) *Ibid.*

(i) East's P. C. 1035.

(k) See above, p. 66; and *Rickman's* case, East's P. C. 1034, *Glandfield's* case, *Ibid.*

(l) *North's* case, East's P. C. 1021.

(m) *Minton's* case, *Ibid.*

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another (n). (1) An indictment for a *battery* is sustained by evidence of the smallest injury done to the person of a man, in an angry, rude, revengeful, or violent manner (o). A previous assault upon the defendant by the prosecutor is evidence in justification (p) under the plea of not guilty. But in order to make this a good justification, it seems that it ought to appear that the striking by the defendant was in his own defence, and was in proportion to the attack made; and that if *A.* give *B.* a slight blow, it will not justify *B.* in maiming *A.*, or in beating him violently and outrageously, and without a view to his own defence (q).

* 71 * Where the defendant is indicted for an assault, with intent to murder, and it appears that if death had ensued it would have amounted to manslaughter only, the defendant should be acquitted on the first count (r).

Assault with
intent to rob.

Assault, with intent to rob, 7 Geo. II. c. 21 (s).—In *Par-*

(n) 1 Haw. c. 62.

(o) 1 Haw. c. 62. As by spitting upon him, *R. v. Cotesworth*, 6 Mod. 172.

(p) Per Holt, C. J. 6 Mod. 172.

(q) *Cockcroft v. Smith*, 2 Salk. 642. In an action for assault, battery and mayhem, the plea of *son assault demesne* was held to be a good plea, because it might be such an assault as endangered the party's life; but upon the question what assault was sufficient to maintain such a plea in mayhem, Holt, C. J. said that Wadham & Wyndham, Justices, would not allow it if it was an unequal return, but that the practice had been otherwise, and was fit to be settled, that for every assault he did not think it reasonable that a man should be banged with a cudgel; and that the meaning of the plea was, that he struck in his own defence. That if *A.* strike *B.*, and *B.* strike again, and they close immediately, and in the scuffle *B.* maims *A.* that is *son assault*; but if, upon a little blow given by *A.* to *B.*, *B.* give him a blow that maims him, that is not *son assault demesne*. See 11 Mod. 43, S. C. [See *State v. Wood*, 1 Bay., 351. *acc.*]

(r) Per Ld. Kenyon, *R. v. Mytton*, East's P. C. 411. *Bacon's case*, 1 Lev. 146; 1 Sid. 220; Staundf. 17. But if there be but one count, *semble* the defendant may be found guilty of the assault simply. See Stark. Crim. Pl. 388. The defendant, a soldier, marching in file along the Strand, wantonly jostled the prosecutor off the pavement, who thereupon struck him with a small stick which he had in his hand, on which the defendant aimed a blow at the prosecutor with his bayonet fixed on his musket, and thrust him under the ear; and Ld. Kenyon being of opinion, that if death had ensued it would have been manslaughter only, directed an acquittal on the first count. *R. v. Mytton*, East's P. C. 411.

(s) See Stark. Crim. Pl. 404.

(1) [If a man raise his arm against another, but accompany the action with words showing a determination not to strike—it is not an assault. *Commonwealth v. Eyre*, 1 Serg. & Rawle. 347.]

fait's case (*t*), the indictment charged an assault with a pistol, with intent to rob. It appeared in evidence that the prisoner did not make any demand or motion, or offer to demand the prosecutor's money, but only held a pistol in his hand towards the prosecutor, who was on the coach-box, and bade him stop; and L. C. J. Willes, and Chappell, Js., are said to have held, that the case was not within the act, because no demand was proved; but the words of the act are in the *disjunctive*; and where the indictment is framed upon the first branch of it, a demand is unnecessary, and it is for the jury to decide with what intent the assault was made (*u*).

In *Thomas's* case (*x*) it appeared that the prosecutor *Lowe* was in a chaise, and that the prisoner, after following it for some time, presented a pistol to *Dring* the postboy, bidding him stop, with many violent oaths, but making no demand of money: the carriage * stopped, and the prisoner * 72 rode up to the chaise, but perceiving that he was pursued, immediately rode away. Upon an indictment for an assault on *Lowe* with intent to rob him, the prisoner was acquitted, because there was no evidence of an assault upon *Lowe*. And he was acquitted upon an indictment for an assault on *Dring* the postboy, with intent to rob him, because it appeared that there was no intent to rob him; for when he stopped, the prisoner made no demand upon him, but went up to the person in the chaise (*y*).

And in the case of *Trusty* and *Howard* (*z*), where the prisoners were indicted for a felonious assault, with an offensive weapon, with intent to rob, it appeared, that one of them, presenting a pistol to the prosecutor, bade him stop, which he did, but called out for assistance; on this the prisoners threatened to blow his brains out if he called out any more, which he nevertheless continued to do, and the men were taken; and although no demand of money was made they were convicted and transported. Under this branch of the act it must be proved that the assault was made upon the person whom the prisoner intended to rob. And if the assault be made on *A. B.*, and it appear in evidence that the intent was to rob *C. D.*, the prisoner cannot be convicted.

(*t*) East's P. C. 406.

(*u*) See East's P. C. 417.

(*x*) East's P. C. 417. Leach, C. C. L. 372.

(*y*) East's P. C. 417. Leach, 372.

(*z*) Sess. Pap. 735. Stark. Crim. Pl. 404.

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Promise.—
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A declaration on a promise to deliver good merchantable wheat is not supported by evidence of an agreement to deliver good second-sort of wheat (*s*). A contract to deliver *soil* or *breeze*, varies from a contract to deliver *soil* (*t*) (1). A contract to carry goods, and * deliver them

(*s*) *Ld. Ray*. 735.

(*t*) *Cook v. Munstone*, 1 N. R. 351.

(1) [A declaration for the sale and delivery of pine timber is not supported by evidence of the sale and delivery of spruce timber. *Robbins v. Otis*, 1 Pick. 868. A declaration alleging that certain machines were warranted to be good and merchantable is not supported by proof that they were warranted to be equal to any in America. *Goulding & al. v. Skinner & al.* 1 Pick. 162. Where a declaration stated, that in consideration the plaintiff would deliver a certain note to a third person, there to remain until the defendant should pay a note given by the plaintiff to A. the defendant promised the plaintiff to save him harmless, &c.—and the evidence was that the plaintiff agreed to deliver the note to a third person, and let it remain until he should return from a journey, and that in consideration, &c. the defendant promised; the variance was held to be fatal. *Colt v. Root*, 17 Mass. Rep. 229. The plaintiff cannot give in evidence an entire contract relating to two distinct subjects, when he declares only as to one of them. *Crawford v. Morrell*, 8 Johns. 253: And where the contract declared on was that the defendant should pay for half the land for a highway, and the contract proved was that he should pay for all the land, it was held to be a fatal variance. *Ibid.* The words, *for value received*, in setting forth a promissory note in a declaration, are words of description and not an averment; and if the note produced in evidence want those words, it is a variance. *Saxton v. Johnson*, 10 Johns. 418. So where a declaration alleged a promise that in consideration the plaintiff would indorse a note, &c. and the evidence was of a promise in consideration of the plaintiff's having indorsed the note. *Bulkley v. Landon*, 2 Conn. Rep. 404. Evidence that the defendant sent *treasury notes* by mail, does not support an allegation that he sent *cash*. *Fouquet v. Headley*, 3 Conn. Rep. 534. An allegation of a promise to pay money is not supported by evidence of a promise to deliver certificates of debenture. *Baylies & al. v. Fettyplace & al.* 7 Mass. Rep. 325. A declaration on a promise to deliver cloth to the plaintiff is not supported by evidence of a contract to deliver cloth at the defendant's factory. *Clark v. Todd*, 1 Chip. 213. Where the contract stated in the declaration is on a past consideration for the delivery of goods, without mentioning the place of delivery, and in the alternative as to time; and the contract proved is on an executory consideration, to deliver goods at a particular time and place mentioned, the variance is fatal. *Robertson v. Lynch*, 18 Johns. 451. When money paid is alleged to be the consideration of a promise, such allegation is not proved by evidence of payment after the promise was made. *Bender v. Manning*, 2 N. Hamp. Rep. 289. A note payable at sixty days cannot be given in evidence to support a count which does not state when the note was payable. *Sheehy v. Mandeville*, 7 Cranch, 208. In New Jersey a declaration on a contract to carry

to *A. B.* the plaintiff, varies from a contract to carry goods and deliver them to *J. S.* (*u*). A contract to deliver so many bushels of corn varies from a contract to deliver so many bushels, according to a particular measure, which is greater than the Winchester measure, since by the bushel generally the Winchester bushel must be understood (*x*). It is no variance, although it appear that a part of the contract has not been alleged, which respects the liquidation of damages only, after a right has accrued by breach of contract, for it is matter of evidence only in reduction of damages (*y*).

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It is no variance that the defendant promised some other distinct matter in addition to that alleged, since the proof supports the declaration as far as is requisite (*z*). It is true that the defendant did promise that which is alleged, although he further promised some other thing in addition; therefore a declaration on a contract to pay 52*l.* 10*s.* for run-money is supported by proof of a note, by which the defendant undertook to pay the plaintiff 52*l.* 10*s.*, together with a pint of rum per day (*a*). So a promise to deliver a horse, which should be worth 80*l.*, and be a young horse, is supported by proof of a promise to deliver a horse which should be worth 80*l.*, and be a young horse, with a warranty that it had never been in harness (*b*).

(*u*) *Leery v. Goodson*, 4 T. B. 687.

(*x*) *Hockin v. Cooke*, 4 T. R. 314. See the stat. 12 Hen. 7, c. 5; 22 Car. 2. c. 8.

(*y*) *Clarke v. Gray*, 6 East, 564; and therefore, in a declaration against a carrier, it is not necessary to notice the limitation of his responsibility by notice, *Ibid*.

(*z*) *Cotterell v. Cuff*, 4 Taunt. 285. *Tempest v. Rawling*, 13 East, 18. For other instances, see tit. *Variance*.

(*a*) *Baptiste v. Cobbold*, 1 Bos. & Pul. 7.

(*b*) *Miles v. Sheward*, 8 East, 7.

salt for \$1,87 1-2 per tierce, was supported by evidence of a written agreement to carry it for 15 shillings, and by proof, that by the currency of New York, the amount was the same. *Salter v. Kirkbride*, 1 Southard's Rep. 223. And in an action on a promise of indemnity, alleging that *A.* had recovered a certain sum against the plaintiff, proof of the recovery of a different sum by *A.* was held not to be a fatal variance, because the recovery was stated by way of inducement, and not as the ground of the suit. *Ripsher v. Shane*, 3 Yeates, 575. See also *Livingston v. Swanwick*, 2 Dallas, 300. *Cunningham v. Kimball*, 7 Mass. Rep. 65. *United States v. Colt*, 1 Peters' Rep. 153. *Ferguson v. Harwood*, 7 Cranch, 408. *Henry v. Henry*, 1 Chip. 265. *Silver v. Kendrick*, 2 N. Hamp. Rep. 160. *Porter v. Talcott*, 1 Cowen, 359.]

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Contract.—
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—Variance.

The variance is fatal if the *whole of the consideration* * be not truly set out, for otherwise the contract is not truly stated (c) (1). A warranty upon a consideration that the plaintiff would buy a horse at a certain price, *scil.* 86*l.* 5*s.*, is not supported by evidence of a warranty upon the purchase of two horses jointly for the sum of sixty guineas (d). An averment that stock was to be transferred *on request* is not proved by evidence that it was to be transferred on a particular day (e).

Variance.—
Dates, sums,
&c.

In general a variance as to dates, quantities, or sums, is not material, unless the precise date, quantity, or sum, is essential to the contract, or is made material by the form of the declaration; as, where it professes to describe the contents of a written instrument (f). Where the promise was laid on the 24th of March, and to a plea of tender, the plaintiff replied a bill filed on the 12th of February; upon the objection being taken, the court held that the day was alleged merely for form, and that the plaintiff would not have been confined to it in evidence; but, that if it had been the case of a note it would have been different, since then the day would have been an essential part of the agreement (g). Where the declaration alleged an agreement to purchase eight tons of hemp, under a *videlicet*, and the contract proved was for the purchase of *about* eight tons; and it also appeared, that after the contract the hemp * 87 * had been weighed, and amounted to eight tons; it was held, that the variance was not material, since, when the

(c) *Miles v. Sheward*, 8 East, 7. [See Godb. 154. pl. 202. Yelv. 57 note (1), and cases there cited.]

(d) *Hart v. Davis*, N. P. Dec. 1796.

(e) *Bordenave v. Gregory*, 5 East, 111.

(f) 3 T. R. 590.

(g) *Matthews v. Spicer*, Str. 806; and *semble*, not even then, unless it had amounted to a misdescription of the instrument, by alleging that it bore date on such a day. Where an action was brought on a note dated 1704, and the replication alleged a bill filed in 1713, and that the cause of action arose within six years, it was held to be a departure, because the day was material, and judgment was arrested. *Stafford v. Forcer*, 10 Mod. 311. Gilb. Cas. 311. S. C. [See Ballentine on Limitations, chap. x. 1 Chit. Pl. 622, 623. Yelv. 71, note (2).]

(1) [In *Wroe v. Washington*, 1 Wash. 357, the declaration stated an agreement that the plaintiff would rent and furnish a house and board the defendant for a certain time, at a fixed price.—The agreement proved was that the plaintiff would board the defendant for the time and price mentioned in the declaration; and the variance was held to be immaterial.]

weight had been ascertained, it was in effect a contract for eight tons (*h.*)

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It is essential that the consideration should be such as the law will sanction : if it be illegal or contrary to justice and sound policy, no action can be founded upon it (*i.*)

Legality.

Where the illegal consideration is set forth upon the record, the objection may be taken either by demurrer, or in arrest of judgment. Where it does not appear on the record, the defendant may show that the claim is in reality founded upon an illegal and noxious agreement. In some instances however the plaintiff's claim is even founded upon the illegality of the agreement ; as, where he seeks to rescind an illegal contract, whilst it is executory, and recover the money which he has advanced under it (*k.*).

(*h.*) *Gladstone v. Neale*, 13 East, 409. See also *Wickes v. Gordon*, 2 B. & A. 335.

(*i.*) In conformity with the rule of civil law, *ex turpi causa non oritur actio*.

(*k.*) See tit. *Money had and received*. In general where the demand arises out of any agreement which is illegal or immoral, or contrary to sound policy, the courts will not lend their aid to enforce it. See *Jordaine v. Lashbrook*, 7 T. R. 601 ; *Cockshott v. Bennett*, 9 T. R. 763 ; and the cases cited, tit. *Money had and received* ; *Money paid* ; *Aubert v. Maze*, 2 B. & P. 371 ; *Booth v. Hodgson*, 6 T. R. 405 ; *Mitchell v. Cockburne*, 2 H. B. 379. As where the consideration is a simoniacal presentation to a living, (*Cro. Car.* 387, 358, 361,) or the escape of a prisoner in execution, (*Martin v. Blithman*, *Yelv.* 197.) Where a house is let, or dress supplied for the purpose of prostitution, (*Girardy v. Richardson*, 1 Esp. C. 13 ; *Howard v. Hodges*, *Cor. Ld.* Kenyon, 1796. But see *Lloyd v. Johnson*, 1 B. & P. 340.) Where money has been advanced in furtherance of a joint illegal agreement, or received upon an executed illegal agreement, (see the cases under the count for money had and received.) So where an agreement is entered into for the sale of a public office, or that one person shall hold a public office in trust for another, (*Parsons v. Thomson*, 1 H. B. 322 ; *Blackford et al. v. Preston*, 8 T. R. 89 ; *Layng v. Paine*, *Willes*, 571,) it cannot be enforced, as being contrary to sound policy.

The decisions upon this head have conflicted, not so much in consequence of any doubt upon general principles, as of the difficulty in applying them. The general principle and foundation of them all is this, that the law will not lend its aid in furtherance of an illegal or immoral transaction, or of any contract which is in general inconsistent with sound policy ; but that, on the contrary it will interfere for the purpose of preventing the execution of an illegal agreement, and of furthering the enactments of any prohibitory or remedial statute. The application of this principle is strongly exemplified in the case of the action for money had and received, where the law prohibits or enforces the recovery of the money, just as the prohibition or enforcement will further the object of the legislature. If the money has been paid upon an illegal agreement which re-

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Conditional
precedent.

* Where the promise is merely conditional, upon some precedent act to be performed by the plaintiff, the promise

mains *executory* between the parties, the law enforces the recovery of the money, because it thereby prevents a violation of the statute by carrying the illegal agreement into effect ; it affords the party a *locus penitentiae*, and encourages him to recede from the illegal contract before it is too late. Where the money has been paid by one who was the object of the law's protection, and who is not equally culpable with the defendant who has received the money, the courts allow it to be recovered, although the agreement has been carried into effect, since the object of the statute was to protect the plaintiff. But where both parties are equally implicated in guilt, and the illegal contract has been carried into effect, the law denies its aid ; for both parties are equally guilty, and equally undeserving of the aid of the law, and the best policy is to favour neither. (See *Lacausade v. White*, 7 T. R. 535, *contra* ; but this case has often been denied. (1)) The principal difficulty has arisen where a claim has been made by one partner in an illegal transaction against another. It has been allowed on all hands, that where one partner has paid money for another in an illegal transaction, no action can be maintained, without evidence of an express request made by the defendant to the plaintiff to pay the money, since no implied assumpsit to pay the money can arise out of an illegal transaction ; where such request has been made, many learned Judges have been of opinion that the partner or agent in the illegal transaction who paid the money, might rely on the express assumpsit, and that he had no more concern with the illegal transaction itself in the course of which the money was paid, than if a mere stranger had paid it at the defendant's request ; and that therefore where the illegal object was merely *malum prohibitum*, the plaintiff was entitled to recover. In other and later instances very learned Judges have held, that a partner in such an illegal transaction, who had paid money even at the express request of his copartner, could not recover, since his claim is mixed up and contaminated with the illegal agreement itself, and cannot be separated from it ; that the distinction founded on an express request is untenable, because in every case of such a partnership the jury would be warranted in finding an assent to the payment ; and lastly, that the distinction between *malum prohibitum* and *malum in se* is not a sound one. It is indeed a distinction very difficult to be supported ; every act which is immoral, must, it should seem, be *malum in se*, and it can scarcely be denied that the wilful violation of any positive law is not more or less immoral. A man may in fact be more guilty in a moral point of view in doing that which is usually termed a mere *malum prohibitum*, than in committing that which is *malum in se*. The destruction of the current coin of the realm to the prejudice of the whole community is merely *malum prohibitum*, if there be any virtue in the distinction ; yet surely any act tending to this prejudice is more mischievous and more immoral than the telling a lie, which is *malum in se*. In reality, an act is immoral, independ-

(1) [See Evans's "Essay on the Action for Money had and received," Part II. where the inaccuracy of the report of *Lacausade v. White* is very satisfactorily exposed, and the actual decision of the court shown to be conformable to previous and subsequent cases.]

must be so alleged in the declaration, or the variance would be fatal. Where the * promise depends upon the performance of a condition precedent, the plaintiff either alleges performance, or alleges some matter in excuse for * 89

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ently of any prohibitory law, in proportion to the evil which is likely to result from it; in a moral point of view, every act from which evil is likely to flow is *malum in se*, and the abstract immorality does not depend on any positive prohibition. The broad, general, and intelligible test for the decision of these cases, seems to depend upon the question, whether the sustaining such actions would encourage and support illegal or immoral contracts, or whether the immorality be not so far out of the question that no rule or principle of sound policy is violated in enforcing a contract which in conscience ought to be performed. If money be advanced in order to effectuate a criminal purpose, and be applied in furtherance of that object, a court, in lending its aid to the recovery of that money would be sanctioning and consummating a contract founded in criminality; the affording legal protection to the lender would encourage the affording of aid and supplies for such purposes in future, and in consequence encourage the committing of the offence itself.

A party who lends his aid to the commission of an offence is himself criminal in point of law as well as morals. If a man were to advance money to another to purchase a weapon for the committing of treason or murder, would he not at least be guilty of a misprision of treason or felony? In such cases, and where the money is so applied, the plaintiff's claim is tainted with criminality, and he seeks to recover through the medium of an illegal transaction. It can make no difference in principle whether the money was advanced by a partner, or by a stranger, provided the criminal object was known and intended, or whether the contract was express or implied. Upon the same principle of policy, the law, in many instances, permits money supplied for an illegal purpose to be recovered before the object has been executed, for it is the policy of the law to assist and encourage parties in receding from illegal projects. Where money has been paid in execution of an illegal contract to the agent, whose principal is a *particeps criminis*, the principal, it seems, ought to recover it; the party who paid it to the agent is not entitled to it, since it has been paid in consummation of an executed illegal contract, and it would be against conscience that the agent should be allowed to retain it; it is the money of the principal, and the case seems to be the same in effect as if the principal had received the money with his own hands, and then delivered it to the agent. He does not claim as from the agent, through the medium of an illegal contract; his title arises immediately from the act of the agent in receiving the money to his use; and therefore the case differs widely from that of money knowingly lent for an unlawful purpose, where the illegal object is immediately connected with the lending, which is the consideration for the promise.

Since these observations were made, the case of *Cannan v. Bryce*, 3 B. & A. 179, has been decided, which seems to remove the doubts formerly entertained upon questions of this nature, *vid. infra*, 105.

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Proof of con-
ditions pre-
cedent, &c.

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the non-performance (*l*) ; * and the proof varies accordingly. And where the agreement contain mutual conditions or covenants to be performed at the same time, the plaintiff * must either aver performance, or a readiness to perform his part of the contract (*m*).

* In an action for not delivering goods according to an agreement, it is unnecessary for the plaintiff to adduce evidence of the averment, that he was ready and willing to pay for the goods (*o*). To satisfy an averment that the

(*l*) *Ughtred's case*, 7 Rep. 10, a. 1 T. R. 638. Doug. 690. Com. Dig. Pleader, c. 51. 1 Chitty on Pleading, 309.

(*m*) Ibid. and 1 East, 103. The question, what will constitute a condition precedent, is purely a consideration of law, arising upon the inspection and construction of the agreement itself. (See 1 Will. Saund. 320, a.) Since, however, the omission to aver the performance of a condition precedent is a ground of nonsuit at the trial, when it appears that the defendant has not undertaken or covenanted absolutely, but only upon the performance of some condition by the plaintiff, the performance of which he has not alleged, it may be proper to observe, in the first place, that covenants and agreements are to be construed according to the intention and meaning of the parties, to be collected from the whole instrument. (*Porter v. Shephard*, 6 T. R. 668. *Hotham v. East India Company*, 1 T. R. 645. *Campbell v. Jones*, 6 T. R. 571. *Morton v. Lamb*, 7 T. R. 130.)

If a day be appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen before the thing which is the consideration for the payment of the money, or the doing of any other thing, an action may be brought for the breach before performance, since it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. (1 Will. Saund. 320, a.) And so it is where no time is fixed for the performance of that which is the consideration for the payment of the money or other act. Ibid. and see *Campbell v. Jones*, 6 T. R. 572. *Thorpe v. Thorpe*, 1 Salk. 171 ; 1 Ld. Raym. 665 ; 1 Lut. 250 ; 12 Mod. 461 ; 1 Vent. 177, *Peters v. Opie*, 1 Salk, 113 ; 2 H. B. 389. But where the consideration is to precede the act covenanted for, it is a condition precedent. Ibid. and *Boon v. Eyre*, 1 H. B. 273, n. ; 1 Salk. 171 ; 1 Ld. Raym. 665 ; 12 Mod. 462 ; 1 Lutw. 251 ; Dyer, 76, a. Where a covenant goes to part only of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of such covenant, without averring performance. (*Boon v. Eyre*, 1 H. B. 273, n. a. *Campbell v. Jones*, 6 T. R. 570 ; 1 Will. Saund. 310, b.) But where the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, and performance must be averred. (*Duke of St. Albans v. Shore*, 1 H. B. 270. *Large v. Cheshire*, 1 Vent. 147.) Where the two acts are to be done at the same time they are also mutual conditions ; as, where *A.* covenants to convey an estate to *B.* on a day specified, and in consideration thereof *B.* covenants to pay *A.* a sum of money on the same day. 1 Salk. 112, 113. 171, *Thorpe v. Thorpe*. 2 Salk. 623 ; 1 Will. Saund. 320, c. and the cases there cited.

(*o*) *Wilkes v. Atkinson*, 1 Marsh. 412,

plaintiff was ready and willing to transfer, and requested the defendant to accept stock, which he refused, the plaintiff must prove an actual tender and refusal, or that he waited at the Bank on the day appointed for the transfer, until the close of the transfer books, the latest moment when the transfer could have been effected (*p*).

Where the plaintiff alleged, in an action for not completing the purchase of certain shares, that he was *lawfully entitled* to so many shares, and it appeared from the act of parliament which created the shares that no legal title had been vested in him, it was held to be a ground of nonsuit (*q*). Where a mere duty is to be paid on request, the bringing of the action is a sufficient request; but if the defendant promise to pay a collateral sum on request, an actual request must be alleged and proved. As, where the defendant undertakes to pay 10*l.* on request if he does not perform an award (*r*).

The general count of *indebitatus assumpsit* is founded upon an implied promise to pay a certain debt or duty, upon a consideration, executed at the instance and request of the defendant, or upon a legal obligation arising from the particular circumstances of the case (*s*). The plaintiff must prove, 1st, a consideration executed; 2ndly, at the request of the defendant. The necessity of proving * a request, or that which is equivalent to it, or is evidence * 93 from which a request may be inferred, follows from the principle of law, that no one can constitute another person his debtor without his permission; and consequently it is not sufficient that the plaintiff should have rendered services to the defendant, without also showing that the defendant assented to the services, and expressly or impliedly agreed to remunerate the plaintiff for them. In order to show this, it is essential, in every declaration in *assumpsit*, which is founded upon a past consideration, to allege it to have been done at the special instance and request of the defendant (*t*); and, in evidence, it is necessary in some instances to prove an express request by the defendant, and

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assumpsit.

* 93
Proof of re-
quest.

(*p*) *Bordenave v. Gregory*, 5 East, 107.

(*q*) *Latham v. Barber*, 6 T. R. 67.

(*r*) B. N. P. 151. 1 Saund. 33, and note (2). [1 Chit. Pl. 322, 3. Yelv. 67. a. note (1).]

(*s*) See B. N. P. 129. *Bell v. Burrows*, 5 Geo. 3, cited *ibid*.

(*t*) *Lamplugh v. Braithwaite*, 1 Roll. Ab. 11. *Bosden v. Thin*, Cro. J. 18; 1 Will. Saund. 264, n. (1); Dyer, 272; Hob. 106. *Hayes v. Warren*, Str. 933.

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quest,

in others to prove circumstances from which a previous request may be inferred. (1)

If the service be not for the benefit of the defendant himself, evidence of an express previous request is essential, and a subsequent promise is not sufficient.

A.'s servant being arrested, *B.*, the friend of *A.*, bailed him, and *A.* afterwards undertook to indemnify *B.*; and it was held, that this promise was not binding, because the consideration was past; but that it would have been otherwise had *A.* previously requested *B.* to bail his servant (*u*). But if the defendant derive benefit from the service, that will be evidence of a previous request; as, where the plaintiff has paid a sum of money for the defendant, or bought goods for him without his knowledge or consent, and he afterwards assents to the payment, or uses the goods.

* 94 Where the defendant was under a legal obligation to procure the service to be done, a subsequent promise * to pay will be evidence of a previous request. And therefore, where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and cured her, and afterwards the overseers promised payment, it was holden to be binding (*x*). But a mere moral obligation is it seems insufficient without a previous request (*y*). A master is not liable on an implied *assumpsit* to pay for medical attendance on his servant (*z*). And the overseers of a parish to which a pauper belongs are not liable, without an express promise, to reimburse the overseers of another parish, for medicines supplied to the pauper during his casual residence there (*a*). Where

(*u*) *Dyer*, 272, a. 1 Roll. Ab. 11, pl. 2, 3.

(*x*) *Watson v. Turner*, B. N. P. 129, 147, 281. See also *Wing v. Mill*, 1 B. & A. 105. And where a casual pauper accidentally fractured his leg, and was attended by a surgeon who attended the parish poor, with the knowledge of the overseer of the poor, who visited the pauper, there it was held that a request by the overseer might be presumed. *Lamb v. Bunce*, 4 M. & S. 275. But see *Gent v. Tompkins*, 1 D. & R. 541.

(*y*) See the note 3 B. & P. 249, and the cases there collected. [Yelv. 41. b. note. 5 Taunt. 36. 13 Johns. 259.]

(*z*) *Wennall v. Adney*, 3 B. & P. 247. But see *Newby v. Wiltshire*, 2 Esp. C. 739. *Scarman v. Castel*, 1 Esp. C. 270.

(*a*) In *Atkins v. Banwell*, 2 East, 505, a pauper residing in the parish *A.* was relieved there, and supplied with medicines by the parish-officers, and it was held, that the officers of the parish *B.* to which the pauper belonged, were not bound to repay the money so

(1) [See Yelv. 41. a. note, and cases there collected. 16 Johns. 284. note. *Inhabitants of Roxbury v. Worcester Turnpike Corporation*, 2 Pick.—*Greeves v. McAllister*, 2 Binney, 591.]

goods are supplied to a feme covert living apart from her husband, without any fault of her own, suitable to her rank in life (b), or where the plaintiff, to save himself, pays money for the defendant, which the latter was in law bound to pay (c), no evidence of a previous request or subsequent promise is necessary (d). So, in many instances, where the defendant * has committed a *tort*, with respect to the property of the plaintiff, the latter may *wave the tort*, and bring his action for goods sold and delivered, or for use and occupation, according to the circumstances of the case (e). In these cases, no evidence, either of a previous request or subsequent promise is necessary; for as soon as, in point of law, a debt certain is due from the defendant to the plaintiff, the law infers a promise on his part to pay it; whereas, in the other cases, either a previous request, or subsequent promise, or some evidence of assent, is essential to constitute a perfect legal duty. * 95

When the terms of a special agreement have been performed so as to leave a mere simple debt or duty between the parties, the plaintiff may give the circumstances in evidence, and recover under a general count of *indebitatus assumpsit* (e). (1)

General indebitatus assumpsit.

Proof by special agreement.

expended. During the attendance of the parish surgeon on a casual pauper, the overseer called, and desired the surgeon to take care of the pauper, and do what he could for him, and that he would see him paid; and it was held that there was not any legal obligation on the overseers to pay such demand in the first instance, or to provide for the pauper; and a new trial was directed, that the Jury might distinctly consider whether the plaintiff's attendance was in consideration of the promise to pay. *Gent v. Tompkins*, 1 D. & R. 541.

(b) *Jenkins v. Tucker*, 1 H. B. 90. So for the funeral expenses of the wife, *Ibid.* *Secus*, where she leaves the house of her husband without necessity. *Horwood v. Heffer*, 3 Taunt. 421.

(c) *Vid. infra*, 101, 102. 106.

(d) *Qu.* Whether in the former case the wife, and in the latter, the plaintiff, may not be considered to be the agents of the defendant.

(e) *Vid. infra*, 109.

(e) *Gordon v. Martin*, Fitzg. 303. B. N. P. 139. Gilb. Law of Evid. 191. Tri. per pais, 399. Style, 461.

(1) [But a plaintiff cannot recover on an implied assumpsit for the value of goods delivered, where there is an existing written contract, in part performance of which the goods were delivered. *Wood & al. v. Edwards & al.* 19 Johns. 205. Where both parties have departed from the special agreement, an action may be maintained on an implied promise. *Goodrich v. Laffin & al.* 1 Pick. 57. Or where a special agreement contains nothing more than the law will imply. *Gibbs v. Bryant*, 1 Pick. 119. See also *M'Williams v. Willis*, 1 Wash. 199. So where a special agreement is void on ac-

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* 96

Indebitatus assumpsit—when supported by a special contract.

If goods are to be paid for at a specified time, an *indebitatus assumpsit* will lie when the time has expired (*f*). If goods are to be paid for by a bill at two months, although the acceptance of the bill be refused, the action of *indebitatus assumpsit* cannot be brought until the expiration of the time of credit (*g*), and then the action will lie (*h*). If a bill be given in payment for goods, and there be no agreement as to time, and the bill turn out to be worthless, an action may be commenced immediately (*i*). (1) And it is sufficient, if, from the memorandum, it appear that the bill was filed after the time when the credit expired (*e*).

If the plaintiff should declare upon a special contract, as well as upon the general count, and fail in his proof upon the special count, but yet establish a special contract, the terms of which have been performed, he will still be entitled to recover on the general count, provided he would have been entitled to recover on that count if no special agreement had been laid in the declaration (*k*). If he de-

(*f*) *Mussen v. Price*, 4 East, 147.

(*g*) *Dutton v. Solomonson*, 3 B. & P. 582.

(*h*) 4 East, 75. 147. *Brooke v. White*, 1 N. R. 330. Lord Alvanley's dictum, 3 B. & P. 582, contra. See tit. *Goods sold and delivered*.

(*i*) *Stedman v. Gooch*, 1 Esp. 5. *Puckford v. Maxwell*, 6 T. R. 52. *Owenson v. Morse*, 7 T. R. 64. [See *Henry v. Donaghy*, Addison's Rep. 39. *Roget v. Merritt & al.* 2 Caines' Rep. 117. *Salem Bank v. Gloucester Bank*, 17 Mass. Rep. 1.]

(*e*) *Swancott v. Westgarth*, 4 East, 75. See tit. *Writ*, Part II. sec. cviii.

(*k*) B. N. P. 139. *Harris v. Oke*, Winch. Summ. Ass. 1759. In Buller's N. P. 139, it is laid down, that if a man declare upon a special agreement, and likewise upon a *quantum meruit*, and upon the trial prove a special agreement, but different from what is laid, he cannot recover on either count; not on the first, because of the variance, nor on the second, because there was a special agreement; but in a subsequent part of the same paragraph it is intimated, that the plaintiff ought to have been suffered to recover on the *indebitatus assumpsit* count, provided the terms of the special agreement had been performed.—(2)*

count of illegal consideration, assumpsit will lie on an implied promise to pay what was justly due before the special agreement was made. *Thurston v. Percival*, 1 Pick. 415.]

(1) [See *Ellis v. Wild*, 6 Mass. Rep. 321. *Wiseman & al. v. Lyman*, 7 Mass. Rep. 286. *The People v. Howell*, 4 Johns. 296. *Johnson v. Weed & al.* 9 Johns. 310. *Wilson v. Force*, 6 Johns. 110. *Putnam v. Lewis*, 8 Johns. 389. *Markle v. Hatfield*, 2 Johns. 455.]

(2) [Where there is a count on a special agreement, coupled with a general count for goods sold, the plaintiff may, undoubtedly, abandon his special count, even after he has attempted to prove it and

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clare upon a special agreement, and prove a special agreement, which varies from that laid, and which still remains in force, the special performance or rescinding of the agreement not having raised a simple debt or duty, he cannot recover; for he cannot recover on the special count, on account of the variance; nor on the general count, since the terms of the special agreement have not been rescinded, or reduced by performance to a mere duty. In *Cooke v. Munstone* (1), the plaintiff declared for not delivering thirty-five chaldrons of *soil* or *breeze*, according to a special contract. It was proved that the contract was for the delivery of thirty-five chaldrons of *soil* (only), and that the plaintiff had paid 2*l.* 5*s.*, as earnest, and that it had not been delivered on account of a dispute between the parties as * to the wharf from whence the soil should be loaded; and it was held, that the plaintiff could not recover on the special count, on account of the variance, *soil* and *breeze* being distinct things, nor upon the count for money had and received, since the contract had never been rescinded (m). 97

(1) 1 N. R. 351.

(m) See tit. Money had and received, for the different cases in which a contract is to be considered as rescinded. *Towers v. Barrett*, 1 T. R. 133. *Weston v. Downs*, Doug. 23. *Power v. Wells*, Cowp. 818. *Giles v. Edwards*, 7 T. R. 181. *Hunt v. Silk*, 5 East, 449. *Payne v. Bacomb*, Doug. 651. [Mr. Day's note to *Taylor v. Hare*, 1 N. R. 263. g.] But in such case it should be shown that the defendant has *voluntarily* derived some benefit from the work, for otherwise he would be made to pay for work which he never

failed; and may then resort to his general count. But this can be done only where the proof is *adapted* to the general count. It can never be allowed, where the goods were, in truth, delivered under a special agreement, and where the plaintiff might, beyond all question, sustain a proper count on the special agreement. A contrary rule would enable the plaintiff in every case, by his mere *velition*, to convert a special contract into a general indebitatus assumpsit. *Robertson v. Lynch*, 18 Johns. 456. Where the plaintiff declares on a special contract, and adds the general counts, if the special count is ruled insufficient on demurrer, he cannot give the special contract in evidence under the general counts, on the issue of non assumpsit. *Culver v. Barnet*, 1 Tyler, 182. In an action of general indebitatus assumpsit for services rendered, the plaintiff cannot give in evidence an agreement to pay him in specific articles: He should declare on the special agreement. *Brooks v. Scott's Ex'r.* 2 Munf. 344. S. P. *Spratt v. McKinnays*, 1 Bibb, 595. See *Keyes v. Stone*, 5 Mass. Rep. 391. *Tuttle v. Mayo*, 7 Johns. 132, and note (a) 2d edition. Where the special contract is still in force, the plaintiff cannot resort to the general counts. *Raymond & al. v. Bernard*, 12 Johns. 274. *Jennings v. Camp*, 13 Johns. 94. *Clark v. Smith*, 14 Johns. 326.]

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Indebitatus as-
sumpsit. Effect
of special con-
tract.

Where the plaintiff proves a special agreement and work done, but not pursuant to such agreement, it is said that he shall recover upon the *quantum meruit*; for otherwise he would not be able to recover at all (n). As, if on a *quantum meruit* for work and labour, the plaintiff should prove that he had built a house for the defendant, though the defendant should prove that there was a special agreement about the building of it, viz. that it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement, yet the plaintiff would recover on the *quantum meruit*, although such proof on the part of the defendant might be proper to lessen the quantum of damages.

Where the plaintiff, under a special agreement, has executed the work improperly, since he has not done that which he engaged to do, and which is the consideration of the plaintiff's promise to pay, it seems to be now settled (o) that the plaintiff must recover, if at all, upon the *quantum meruit*, and that he cannot recover * more than the value of the work and materials to the defendant (p). And where the plaintiff has executed his work so ill that the defendant has derived no benefit from it, or none which exceeds in value the sum which he has paid, the plaintiff is not entitled to recover at all (q), even for the labour and materials. (1)

Where a builder undertook a work of specified dimensions, and deviated from the specification, it was held that

contracted for, and against his assent. See *Ellis v. Hamlen*, 3 Taunt. 52.

(n) B. N. P. 139. Mr. Keck's case at Oxon. 1744.

(o) *Basten v. Butter*, 7 East, 479. It had before been held that the remedy of the defendant was by a cross action, and had been so ruled by Buller, J. in *Brown v. Davis*, Taunton Lent Ass. 1794, where the plaintiff had built a booth for the defendant on a race-course so ill, that it fell down, and the defendant had paid part of the sum agreed for.

(p) But where this defence is intended to be set up, the defendant ought to give the plaintiff notice to that effect. *Basten v. Butter*, 7 East, 479.

(q) *Basten v. Butter*, 7 East, 479. *Ellis v. Hamlen*, 3 Taunt. 52. [*Taft v. Inhabitants of Montague*, 14 Mass. Rep. 282. *Rose v. Parker*, 2 Southard's Rep. 780.]

(1) [See Mr. Day's note to *Templer v. McLachlan*, 2 N. R. 141; and Mr. Howe's note to *Denew v. Daverall*, 3 Catap. 454, and American cases there cited. *Crowninshield v. Robinson & al.* 1 Mason's Rep. 93, and cases there referred to. *Miller v. Smith*, *ibid.* 437. *Sweet v. Colgate*, 20 Johns. 196. *Everett v. Gray & al.* 1 Mass. Rep. 101.]

he could not recover on a *quantum meruit* for work and labour and materials (r). Where a special contract has been entered into for the performance of a work, according to a specification, and deviations are made by mutual consent, the plaintiff is entitled to recover, according to the terms of the contract and specification, as far as they are applicable, and upon a *quantum meruit* as to the rest (s). A lessor contracted to pay his tenant, at a valuation, for certain erections, pursuant to a plan to be agreed upon, provided they were completed in two months; no plan was agreed upon, and the lessee proceeded, after condition broken, with the assent of the lessor; and it was held, that the lessee might recover, as for work and labour, upon an implied promise, arising out of so many of the facts as were applicable to the new agreement (t). Upon an *indebitatus assumpsit* for board, schooling and clothes, with account on a *quantum meruit*, * stating, that, in consideration that the plaintiff had taken * 99 J. W. as a scholar into an academy kept by him, and that he had left it without giving due notice, the defendant promised to pay so much as the plaintiff reasonably desired to have, it was held, that the plaintiff was entitled to recover for one quarter beyond the time when J. W. left, a quarter's notice not having been given, according to the original terms of the contract (u).

In order to sustain the count for *money paid*, laid out and expended for the use of another, the plaintiff must prove, Money paid.

First. The payment of the money.

Secondly. The assent of the plaintiff, either express or implied, to that payment; and in some cases a previous request (x).

The plaintiff must shew an actual payment of money, or Payment. its equivalent, and the mere giving a *security* for the payment is not sufficient. A surety for the defendant, who had been discharged under an insolvent debtor's act, was obliged to give a bond and warrant of attorney as a new

(r) *Ellis v. Hamlen*, 3 Taunt. 52.

(s) *Robson v. Godfrey*, 1 Starkie's C. 275. *Pepper v. Burland*, Peake's C. 103.

(t) *Burn v. Miller*, 4 Taunt. 745.

(u) *Eardley v. Price*, 2 N. R. 333. And see *Gandall v. Pontigny*, 1 Starkie's C. 198. [S. C. 4 Camp. 375. In this case, a servant hired by the quarter, having been discharged without sufficient cause in the middle of a quarter, was held entitled to his full quarter's wages, under a count in *indebitatus assumpsit* for work and labour.]

(x) *Vide supra*, 93.

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security for the debt ; and it was held that he could not hold the defendant to bail, as for money paid to his use (*y*).

So where one of several joint makers of a bill gave the holder a bond, and then sued the rest for contribution, in an action for money paid, it was held that the action was not maintainable, no money having in fact been paid (*z*). And it has been held, that the receipt of stock cannot be considered as the receipt of money, either upon an agreement to pay a per-centage on the *receipt of money (*a*), or in an action for money had and received (*b*).

* 100

Payment of
the money.

The damages to be recovered are measured by the sum which the plaintiff has actually paid at the express or implied request of the defendant. Where the payment has been compulsory, the plaintiff cannot recover more than he was under the necessity of paying ; and therefore, although bail above may recover from their principal any sum which they have fairly expended in endeavouring to take him, they cannot recover the costs which have been

(*y*) *Taylor v. Higgins*, 3 East, 169. An allegation that a promissory note was given to *W.* in consideration of money paid by him, is not supported by evidence of promissory note given in consideration that he would pay the money. *Amory v. Merryweather*, 2 B. & C. 573.

(*z*) *Maxwell v. Jameson*, 2 B. & A. 51. [*Cumpling v. Hackley*, 8 Johns. 202.]

(*a*) *Jones v. Brindley*, 1 East, 1. 6 East, 182.

(*b*) *Nightingale v. Devismes*, 5 Burr. 2589. [See post p. 107, note (1).] The cases of *Taylor v. Higgins*, and *Maxwell v. Jameson*, seem to overrule that of *Barclay v. Gooch*, 2 Esp. C. 571, where the plaintiffs having become sureties for the defendant, and having been called upon after his bankruptcy to pay the money, gave their promissory note for the amount ; and Lord Kenyon held, that as the club had consented to take the note as money in payment, it was to be so considered for the purpose of the action, and the plaintiff had a verdict, and a new trial was refused ; and see *Israel v. Douglas*, 1 H. B. 239, where the defendants being indebted to Delvalee, who was indebted to the plaintiff, Delvalee gave an order to the plaintiff, on the defendant's requiring them to pay what was due to him to the plaintiff, and they accepted the order, but on Delvalee's becoming bankrupt refused to pay the amount ; and the Court of Common Pleas (Wilson, J. *dissentiente*) held, that the defendants were to be considered as having received so much money as they owed Delvalee to the use of the plaintiff. Lawrence, J. in the case of *Taylor v. Higgins*, said, that the case of *Israel v. Douglas* had been afterwards disapproved of upon that point, and that he had a note of the case, which differed materially from that cited. Wilson, J. although he differed from the rest of the court in their opinion, that this was money had and received, was of opinion that this was evidence under the count, upon an account stated.

occasioned by unadvisedly resisting the payment of the debt (c)

Secondly, *assent*.—Where there is no *assent*, either express or implied, the action cannot be maintained, and * therefore it cannot be maintained where the money has been paid against the express direction of the party for whose use it is supposed to have been paid. Where two parishes had been united, and long paid a joint sexton; and afterwards one claimed a right of electing a separate sexton, it was held that the other parish could not, after notice, recover a moiety of the sum paid as the sexton's salary, as money paid to the use of the seceding parish (d). So where the holder of stock authorized his broker to contract for the transfer of it, upon the opening of the stock which was then shut, and the broker sold without disclosing the name of his principal, and the stock rising in value, the principal refused to transfer, alleging that the broker had sold the stock at a lower rate than he was authorized to do, and the broker paid the deficiency to the purchaser, it was held that since he had paid the money without the consent of the principal, and could not be considered as a guarantee for his principal, he could not recover for money paid to the use of the principal (e).

The defendant's assent is implied in all cases where the plaintiff is under a legal obligation to pay the money through the default of another; as, where a surety is compelled to pay money on the default of his principal (f) (1)

Assent implied,

Surety.

(c) *Fisher v. Fallows*, 5 Esp. C. 171. [*S. P. Hayden v. Cabot*, 17 Mass. Rep. 169. *Vance v. Lancaster*, 1 Hayw. Tenn. Rep. 130.]

(d) *Stokes v. Lewis*, 1 T. R. 20.

(e) *Child v. Morley*, 8 T. R. 610. See also *Wilson v. Coupland*, 5 B. & A. 228. Post. p. 306. Money paid by the drawer and indorser of a bill of exchange to the indorsee is paid for the acceptor. *Le Sage v. Johnson*, Forrest, 23.

(f) 8 T. R. 310. A. holds a lease under a covenant for re-entry for non-repair, and under-lets to B, who undertakes to repair within three months after notice; after default by B, A. may repair, and recover the amount expended. *Colley v. Stretton*, 2 B. & C. 273. Note, the plaintiff declared specially.

(1) [Where money is paid by a surety for two principals, the law implies a promise by each principal to reimburse the surety for the whole amount paid. *Duncan v. Keiffer*, 3 Binney, 126. But where A. was surety in a bond for B.—and C. agreed with B. that if B. would pay one half of the debt, he would pay the other half on account of C. and B. accordingly paid one half—it was held that A. could not maintain an action against both principals to recover the amount he had paid; the express agreement counteracting the general implication of law. *Ibid*. A surety, *qua* surety, cannot call on his

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The plaintiff in such case must prove the execution of the bond, or other instrument, by which he became the surety for the defendant, and that he became so at the request of the defendant, or that he assented to it; (1) and that he was called upon to pay the money, and gave the defendant notice to pay it.

* 102 Where there are two sureties, each of whom has been obliged to pay part of the debt, separate actions should be brought (g), unless the payment has been * made out of a joint fund (h). Where several are sureties for another, and one of them is compelled to pay the whole debt, he may by separate actions compel the others to contribute their proportions towards his loss (i). (2)

By surety.

Where a verdict has been obtained against several in an action of assumpsit, and the damages have been levied upon one, he may maintain actions against the rest for money paid to their use (k), and the record will be evidence against them (l). But no action can be maintained by one

(g) *Beard v. Boulcot*, 3 B. & P. 235.

(h) *Osborne v. Harper*, 5 East, 225; as where the two sureties jointly borrowed the money which they paid, and gave a joint note for it.

(i) *Cowell v. Edwards*, 2 Bos. & Pul. 268. [*Johnson v. Johnson*, 11 Mass. Rep. 359. *Bachelor v. Fiske & al.* 17 Mass. Rep. 464. *The People v. Duncan*, 1 Johns. 311.]

(k) *Merryweather v. Nixon*, 8 T. R. 186.

(l) 2 N. R. 231.

principal at law, until he has actually paid the money. *Powell v. Smith*, 8 Johns. 249: Thus if judgment be obtained against a surety, who is taken in execution and afterwards discharged under an insolvent act, he cannot maintain an action against the principal, without showing payment, or a promise to indemnify him from all damages and costs, *ibid.* And if the surety of A, on a bond given for the benefit of A. and his partners, pay the amount, he can bring no action against the partners, but must look to A. alone. *Tom v. Goodrich*, 2 Johns. 213. See also *Stuby v. Champlin*, 4 Johns. 461.]

(1) [See *Hassinger v. Solms*, 5 Serg. & Rawle, 4.]

(2) [In North Carolina, one joint surety, who has paid the whole debt, cannot maintain assumpsit against the other, without an express promise—but must seek relief in chancery. *Carrington v. Carson*, Cam. & Nor. 216. And if a person become surety, at the request of another surety who pays the debt, he is not liable to the latter, in law or equity, for contribution. *Taylor v. Savage*, 12 Mass. Rep. 102. If one surety in a bail-bond voluntarily satisfy the judgment recovered against the principal, after execution issued, and *non est inventus* returned, but before *scire facias* served and entered, he cannot compel contribution from the co-surety, because the latter is thus deprived of the privilege of surrendering the principal. *Stillin v. Merrill*, 16 Mass. Rep. 40.]

of several co-trespassers, or other wrong-doers to recover such contribution, for where the transaction is illegal the law will not raise any implied assumpsit (*m*). So where the plaintiff, in consequence of the default of the defendant, has been compelled to pay money to relieve himself, which the defendant ought to have paid, the defendant's consent will be implied; as where the goods of the plaintiff, a lodger in the house of the defendant, are distrained upon by the landlord, and the plaintiff, on default of the defendant's paying his rent, pays the amount to redeem his goods (*n*). Where an accommodation acceptor defends an action at the request of the drawer, he may recover the costs as money paid to the use of the drawer (*o*). Where a carrier by mistake delivered to *B.* the goods of *C.*, and *B.* appropriated the goods, and the carrier on demand, and without action, paid the money, it was held that he might recover against *B.* for money paid to his use (*p*).

* If one of two debtors pay the whole of a debt, the law gives him a right to recover a moiety in an action for money paid to the use of that partner, on the ground that both are liable to pay; but if one pay the whole of a debt in furtherance of an illegal contract, he cannot recover a moiety upon an implied contract to repay, since no implied contract can arise out of an illegal transaction. And although the contrary was formerly held (*q*), it seems to be now settled, that if one

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In an illegal transaction.

(*m*) *Merryweather v. Nixon*, 8 T. R. 186.

(*n*) *Exall v. Partridge*, 8 T. R. 308. Ship-owners are liable for money advanced to the master in cases of necessity. *Rocher v. Busher*, 1 Starkie's C. 27. Even in an English port, *Robinson v. Lyall*, 7 Price, 592.

(*o*) *Howes v. Martin*, 1 Esp. C. 162.

(*p*) *Brown v. Hodgson*, 4 Taunt. 189. But see *Sills v. Laing*, 4 Camp. 81.

(*q*) In *Faikney v. Reynous*, 4 Burr. 2069, the defendant had given a bond to the plaintiff to secure the amount of one moiety of 3,000*l.* paid by the plaintiff for the differences in certain illegal stock-jobbing transactions for himself and one Richardson, in which transactions the plaintiff and Richardson were jointly concerned; and the court held, that since the bond was not given for the payment of the composition-money, which is prohibited by the statute, but only to secure the repayment of money which the plaintiff had advanced for Richardson, upon contracts in which they had been jointly concerned, the bond was good.

It was observed by Lord Kenyon, in *Petrie v. Hannay*, 3 T. R. 418, that the decision in *Faikney v. Reynous* turned wholly on the consideration, that the action was upon a bond, and that nothing had been disclosed in the plea which showed any illegality between the parties, and that they could not take into consideration matter not

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* of the parties pay the whole debt at the express request of another party, and upon a promise of re-payment,

properly introduced by the plea. But according to the report, 4 Burr. 2069, the court seemed to have considered that the agreement to repay was not illegal; and see the opinions of Ashhurst, Buller, and Grose, Justices, in *Petrie v. Hannay*.

That case was as follows; *A.* and *B.* having been engaged in stock-jobbing transactions, came to a settlement with their broker, who paid all the differences; *A.* paid his own share to the broker, and drew a bill on *B.* for his share, which *B.* accepted; *A.*'s executors were afterwards sued upon the bill by the broker, who recovered the amount, and the executors afterwards brought an action for money paid for the defendant's use. It seemed to be admitted on all hands, that the money was to be considered as paid with the consent of the defendant; and the question turned upon the illegality of the transaction. Three of the Judges, Ashhurst, Buller, and Grose, were of opinion that the money was recoverable, since the action was not founded on any promise arising by implication of law out of the illegal transaction, but on an express subsequent promise; and they considered the case as undistinguishable from that of *Faikney v. Reynous*, and as standing upon the same footing as if the broker had paid the amount with the consent of the defendant, and brought the action, or the testator had himself paid it. Lord Kenyon was of opinion, that *A.* and *B.* were to be considered as *participes criminis*, and that the money was not recoverable. In *Steers v. Lashley*, 6 T. R. 61, the defendant having engaged in stock-jobbing transactions with different persons, his broker paid the differences, and a bill was drawn by the broker, and accepted by the defendant, for part of the sum awarded by the plaintiff, and three others, to be due from the defendant to the broker, on account of these differences; and it was held that the plaintiff, who was the indorsee of the bill, and privy to the transaction, could not recover upon it. And in *Brown v. Turner*, 7 T. R. 630, where the broker had paid the differences in stock-jobbing transactions, and the defendant, his employer, had accepted a bill for the amount, the court held, on the construction of the act of parliament and the authority of *Steers v. Lashley*, that the plaintiff, to whom the broker had indorsed the bill after it became due, was not entitled to recover. In *Mitchell and others v. Cockburne*, (2 H. B. 380, Buller, J. being absent), where *A.* and *B.* had entered into a partnership for insuring ships in the name of *A.*, and *A.* had paid the whole of the losses, it was held that he could not recover a moiety of such payments from *B.*; and *Eyre*, L. C. J. distinguished the case from those of *Faikney v. Reynous*, and *Petrie v. Hannay*, since those cases were one step removed from the illegal contract itself, and did not arise immediately out of it; and Heath, J. observed, that it did not appear that the payments had been made by *A.* at the request or with the consent of *B.* In the case of *Aubert v. Maze* (2 B. & P. 371), it was held that money paid by one of two partners on joint insurances, could not be recovered from the other partner. Lord Eldon in this case questioned the soundness of the decision in *Petrie v. Hannay*, and the distinction grounded upon an express consent of the partner; and Heath and Rooke, Justices, denied the distinction between the case of money paid in a concern which is *malum prohibitum*, and where it is paid in a transaction which is *malum in se*. The cases of

* he cannot maintain the action, even upon the express promise. It seems to be now also settled on broad and satisfactory principles, notwithstanding the doubts which once prevailed, that money advanced by one person to another, with a knowledge that it is to be applied in furtherance of an illegal purpose, cannot, after it has been so applied, be recovered.

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For an illegal
transaction.

In the late case of *Cannan v. Bryce* (r), which was an action to recover money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, it was held, on very broad principles, that such an action could not be maintained. The distinction between *malum prohibitum* and *malum in se*, was denied. It was said, that if it be unlawful in one man to pay the money, how can it be lawful in another to furnish him with the means of payment; and it was held, that the case was not distinguishable in principle from that of the druggist, who sold to the brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by act of parliament from mixing with the beer (s).

Where an officer permitted a prisoner to go at large, on his promise to pay the debt, in consequence of which the officer himself was obliged to pay the creditor, it was held that he could not recover the money from the debtor, having been guilty of a breach of duty, from which he could not derive a cause of action (t).

Money lent.—A promissory note given by the defendant to the plaintiff is evidence under this count (u), since the note imports the maker's having so much money of the payee's in his hands. The mere circumstance * of the defendant having received money from the plaintiff is *prima facie* evidence of the payment of an antecedent debt, and not of the loan of money (o).

Money lent.

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So the receipt of money by the defendant, on a cheque

Booth v. Hodgson (6 T. R. 405.), and *Sullivan v. Greaves* (Park on Insurance, 8), were also relied upon by the court as strong instances, to show that the court would not assist a plaintiff in enforcing an agreement which is contrary to law. [See 13 Ves. 313. 14 Ves. 191.]

(r) 3 B. & A. 179.

(s) *Langton & others v. Hughes & others*, 1 M. & S. 593.

(t) *Pitcher v. Bailey*, 8 East, 171.

(u) *Story v. Atkins*, 2 Str. 719; B. N. P. 136, 137. *Harris v. Huntbach*, 1 Burr. 373. [*Kiddie v. Debrutz*, 1 Hayw. 420.]

(o) *Welsh v. Seaborn*, 1 Starkie's C. 474.

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drawn by the plaintiff on his banker, *primâ facie* imports a payment, and not a loan, and is not evidence to go to a jury, unless the plaintiff can give evidence of money transactions between himself and the defendant, from which a loan can be inferred, or of some application by the defendant to borrow money (*x*).

Interest cannot be recovered without proof of a contract to that effect, express or implied, or unless a written security be given for the payment of the money at a time specified (*y*).

Money had and received.

Under the count for money had and received the plaintiff must prove, 1st, the *receipt* of money by the defendant; 2ndly, that it was received to his own use, i. e., his title to it.

Actual receipt of the money.

It must be proved that the money came into the hands of the defendant. And therefore the action is not maintainable against one of two grantees of an annuity, (upon failure of the annuity-deed for want of a memorial,) who was a mere surety, and had received no part of the consideration (*z*). No more than the net sum which the defendant has received without interest can be recovered (*a*). A bill of exchange, payable to the order of

(*x*) *Cary v. Gerrish*, 4 Esp. 9. [See *Cushing v. Gore & al.* 15 Mass. Rep. 74.]

(*y*) *Calton v. Bragg*, 15 East, 223. But see *Trelawny v. Thomas*, 1 H. B. 303, and tit. *Interest*.

(*z*) *Stratton v. Rastall*, 2 T. R. 366. And see *Scholey v. Daniel*, 2 B. & P. 540. *Vide etiam*, *Edgar v. Fowler*, 3 East, 222. Where *A.* obtained possession of the goods of *B.*, delivered by him to *C.*, to be sold at a fixed price, and at the time when the goods were to have been returned, or the price paid, refused to do either, and *C.*, under threat of an action, paid the fixed price to *B.*, it was held that *C.* might recover the amount from *A.* *Longchamp v. Kenny*, Doug. 137, 3d edit. *Secus*, where the goods are delivered with a different view, as to prevent a distress. *Leery v. Goodson*, 4 T. R. 687.

A., being a creditor of *B.*, and *B.* being a creditor of *C.*, for money had and received by *C.*, it was agreed by all parties that *C.* should pay the debt to *A.*; held, that *A.* might recover against *C.* for money had and received to his use. *Wilson v. Coupland*, 5 B. & A. 228.

Where goods were consigned to *A.* and *B.*, in return for goods sent out by the plaintiff, with orders to sell and hold the proceeds to the order of the defendant, who had a lien on the goods, it was held, that the plaintiff could not recover the surplus from the defendant. *Tenant v. Mackintosh*, 4 B. & A. 594. So money paid as an advance upon consignments to partners of the plaintiff cannot be recovered as money had and received to the plaintiff's use. *Cheap v. Cramond*, 4 B. & A. 663; *Waugh v. Carver*, 2 H. B. 235; but see *Muirhead v. Salter*, cited 4 B. & A. 664.

(*a*) 1 B. & P. 266.

the drawer, is evidence in an action by the drawer against the acceptor of money had and received by the latter to the use of the drawer (*b*). The receipt of provincial notes by the *defendant, which he has received as money, is evidence of a receipt of money by him (*c*) (1).

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Upon a count for money had and received by the defendant to the use of the plaintiff, the latter may prove the receipt of money by the defendant and his deceased partner, and also the receipt of money by the defendant himself to the use of the plaintiff; for every partner is liable for the whole, and the proving that another person, together with the defendant, received the money, does not negative the allegation that the defendant himself received it, and therefore there is no variance (*d*).

Receipt of the
money.

Where *A.* sent bills to *B.*, his banker, directing him to pay part of the produce to *C.*, and *B.* refused to act upon the order, but received the produce of the bills, it was held that *C.* could not maintain an action against *B.* for so much money had and received to his use, since, as between the plaintiff and defendant, there was no privity, either express or implied (*e*). But where money was paid into a banking-house, for the purpose of taking up a particular bill then lying there for payment, although the banker's clerk said at the time that he could not give up the bill, but took the money, it was held to be money had and received to the use of the owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor, who had paid the money (*f*).

Where money has been received, with directions to

(*b*) *Thomson v. Morgan*, 3 Camp. 101. And see *Bills of Exchange*.

(*c*) *Pickard v. Bankes*, 13 East, 20. And even in a criminal case, on an indictment for obtaining money by means of a false token, the receipt of a bank-note of the amount has been held to be evidence to the jury of the receipt of the money at the Bank.

(*d*) *Richards v. Heather*, 1 B. & A. 29, in which the doctrine laid down in *Spalding v. Mure* and others, 6 T. R. 363, was overruled.

(*e*) *Williams v. Everett*, 14 East, 582.

(*f*) *De Bernales v. Fuller*, 14 East, 590, in note. [See *Hall v. Marston*, 17 Mass. Rep. 579.]

(1) [In *Barnard v. Whiting*, 7 Mass. Rep. 353, it was held that a count for money had and received, must be for cash, and not for bank bills. And assumpsit for money had and received, money paid, &c. will not lie where *property*, not money, has been received, paid, &c. *Locket v. Bohannon*, 3 Bibb, 378.]

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Proof of the
plaintiff's title
to the money.

pay it to another in discharge of a bill, but the order is revoked before payment, and the receiver is directed *to hold it for another purpose, the holder of the bill cannot maintain this action (*f*).

The plaintiff can recover no more than the net sum received, without interest (*g*).

2dly. *The plaintiff's title*.—The assignees under a joint commission against *A.* and *B.* cannot recover money paid by *B.* before his own, but after *A.*'s bankruptcy, either as money had and received to the use of the bankrupts before the bankruptcy, or to the use of the assignees since (*h*).

Where money has been paid into the hands of a trustee for a specific purpose, it cannot be recovered so long as the trust subsists, except according to the terms of the trust. Thus, money deposited by litigating parties in the hands of a trustee, in trust for the party entitled, cannot be sued for except by the party entitled (*i*). Where money has been deposited with an attorney to conduct a particular suit, it cannot be recovered till the specific purpose be proved to be at an end (*k*).

The action for money had and received resembles a bill in equity (*l*); and wherever the defendant has received money, to which the plaintiff is in justice and equity entitled, the law, it is said, implies a debt, and gives this action *quasi ex contractu* (*m*). And therefore

(*f*) *Stewart v. Fry*, 7 Taunt. 339; 1 Moore, 74.

(*g*) *Walker v. Constable*, 1 B. & P. 306. *Tappenden v. Randall*, 2 B. & P. 467.

(*h*) *Smith v. Goddard*, 3 B. & P. 465. But being joint assignees of both, they might have recovered for money had and received to the use of either. But *qu.* whether they could join such a count with a count for money had and received to the use of both, since the sums recovered would go to separate funds.

(*i*) *Ker v. Osborne*, 9 East, 378.

(*k*) *Case v. Roberts*, Holt's C. 500.

(*l*) Per Ld. Mansfield, Cowp. 795. The action does not lie against a sheriff for not paying rent due on an execution against the tenant. *Green v. Austin*, 3 Camp. 260. Where the plaintiff and defendant each paid *A.*, a witness, his expenses, the loser, after paying the winner his taxed costs, cannot recover from *A.*, for money had and received. *Crompton v. Hutton*, 3 Taunt. 230; *Benson v. Schneider*, 1 Moore, 76.

(*m*) Per Ld. Mansfield, *Moses v. Macfarlane*, 2 Burr. 1008. Per Lord Ellenborough, (4 M. & S. 478.) the action is maintainable wherever the money of one man has, without consideration, got into the pocket of another.

Two churchwardens elected for the township *B.* may maintain the action against the late churchwardens of that township, with-

the plaintiff is entitled to recover where he can show that the defendant has received money belonging to *him under any fraud, false colour or pretence; as, that he has received the rents of the plaintiff's estate (*n*), under pretence of title, or as an intruder into the plaintiff's office (*o*); and the title to the office may be tried in such an action (*p*). But in such case the plaintiff cannot maintain the action unless he has a legal title to the profits so received by possession of the office; and therefore the nominee of a perpetual curacy cannot maintain an action for money had and received against an intruder before he has been licensed (*q*), although it would be otherwise in the case of a donative (*r*). So the action will not lie to recover mere *gratuitous donations* to an intruder, such as are given by strangers for showing a church (*s*).

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So the plaintiff may recover in any case where the defendant has by fraud or deceit received money belonging to the plaintiff, for he may wave the tort, and rely upon the contract which the law implies for him; as where the plaintiff's clerk having received bills from customers for the plaintiff, pays them over to the defendant to effect illegal insurances (*t*). Where *A.* under false pretences, procured a bill of exchange * from *B.* and *A.*'s assignees re-

Money obtained by deceit.
Waver of tort,

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out joining the other late or present churchwardens for the rest of the parish, separate rates being made for the several townships. *Astle v. Thomas*, 2 B. & C. 271.

(*n*) For in such case an action of account will lie; and whenever an account will lie, an action of *indebitatus assumpsit* will lie. *Aris v. Stukely*, 2 Mod. 260; 1 Salk. 9.

(*o*) *Aris v. Stukely*, 2 Mod. 260; T. Jon. 126; 2 Lev. 245; 2 Show. 21. 1 Freem. 473, 478.

(*p*) Ibid. and 2 Vent. 170; 7 Mod. 147.

(*q*) *Powell v. Milbank*, 1 T. R. 399, *n.* *R. v. Bishop of Chester*, 1 T. R. 403.

(*r*) Ibid. For there the title accrues upon mere nomination.

(*s*) *Boyer v. Dodsworth*, 6 T. R. 681. [See 8 Taunt. 265. 2 Moore, 247.]

(*t*) *Clarke v. Shee*, Cowp. 197. *Lightly v. Clouston*, 1 Taunt. 112. *Eades v. Vandeput*, 5 East, 39, *n.* See B. N. P. 130, *Kitchen v. Campbell*, where goods were sold under an execution after an act of bankruptcy committed. B. N. P. 131. See *Thomas v. Whip*, B. N. P. 130, where Parker, Ch. J. said he knew of two cases only where the plaintiff had not such election; the one was in case of money won at play, and the other in case of money paid by a bankrupt (though on a valuable consideration, after an act of bankruptcy committed); for you cannot confirm the act in part, and impeach it for the rest.

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By one claim-
ing title.

ceived the amount, it was held that *B.* might recover against the assignees for money had and received (*u*).

In the case of *Aris v. Stukely* (*x*) it was said by the court, that *indebitatus assumpsit* would lie for rent received by one who pretended a title, because an action of account would lie. But this, it should seem, must be understood of rent received from a lawful tenant, where an ejectment cannot be brought, for it seems that an action of account does not lie against a disseisor, or other wrong-doer (*y*). And it has been held, that an action of assumpsit for rents received would not lie against a defendant, who claimed title to the premises (*z*).

Fraud.

So it was held that a woman might recover against a man who, having a wife alive, pretended to marry her, and received the profits of her estates (*a*).

Where a creditor of a bankrupt received, in common with the rest of the creditors, a composition of 8s. in the pound, and then recovered the whole amount in an action on a bill which he held as a security for the debt, it was held that the bankrupt was entitled to recover the amount as money had and received to his use (*b*).

Duress.

So the plaintiff may show that he has been compelled by duress to pay money to the defendant; as that he was obliged to pay an exorbitant demand to retrieve his goods * 111 from pawn (*c*), or to procure his admission * into a copyhold (*d*). So it lies to recover money levied under a con-

(*u*) *Harrison v. Walker*, Peake's C. 111. See *Willis v. Freeman*, 12 East, 656. So *semble*, where a legatee obtains payment from an executor by fraud. *Crockford v. Winter*, 1 Camp. 124. And see *Hogan v. Shee*, 2 Esp. C. 522. *Bristow v. Eastman*, Peake, C. 223; 1 Esp. C. 172. S. C.

(*x*) 2 Mod. 260.

(*y*) Bac. Ab. Accompt, B.

(*z*) By Wilson, J. in *Cunningham v. Laurents*, 1 Bac. Ab. 260, 5th edit. in note; and he nonsuited the plaintiff. And see *Use and Occupation*; and below, p. 111, n. (*g*).

(*a*) 1 Salk. 28.

(*b*) *Stock v. Mawson*, 1 B. & P. 286.

(*c*) *Astley v. Reynolds*, Str. 915; B. N. P. 132. The court said that it was a payment by *compulsion*, for the plaintiff might have had such an immediate want of his goods, that an action of trover would not have answered his purpose; and the rule *volenti non fit injuria* holds only where the party has a freedom in exercising his will. *Fitzroy v. Gwyllim*, 1 T. R. 153; *aliter*, where there is no immediate and urgent necessity for the redemption of goods, or preservation of the person. *Fulham v. Down*, 6 Esp. 26, n.

(*d*) *Leake v. Lord Pigot*, Staff. Summ. Ass. Sel. N. P. 75. So also it lies to recover money.

viction which has been quashed (*e*), or money which has been paid to a revenue officer to procure the release of goods seized as forfeited (*f*), but which were not liable to be seized. The plaintiff cannot, however, substitute this form of action for the more appropriate ones of trespass or replevin, when they are the specific remedies provided by the law for the particular grievance (*g*). And therefore where the proprietor of cattle wrongfully distrained, pays money in order to obtain the possession of them, he cannot recover it in an action for money had and received, but must proceed in replevin or trespass (*h*). So it is if a tenant, under threat of distress, pays more rent than is due (*i*). But it was held by the Court of Common Pleas, in a subsequent case, that the action lies to recover money which has been obtained through fear of process by distress by an excess of authority, although it has been paid over to a third person, who * was the proper officer to whom * 112 it should have been paid, in case the distress had been legally made (*k*).

So where money has been paid under a mistake to one who is not entitled to receive it, and who has no claim in conscience to retain it (*l*); as where money is paid to the assignees of a bankrupt by a debtor to the bankrupt, without claiming a set-off due to him (*m*). And so it was held where the defendant, supposing himself to be the legal representative of a lessee for years, sold the term, and delivered the lease to the plaintiff, who was afterwards ejected by the rightful administrator (*n*). But money paid under

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(*e*) *Feltham v. Terry*, B. N. P. 131, cited Cowp. 419; 1 T. R. 367.

(*f*) *Irving v. Wilson*, 4 T. R. 485.

(*g*) Where defendant claims title, an action of *assumpsit* for the rents will not lie against him (*supra*, p. 110); and *semble*, he ought to bring ejectment, or if ejectment cannot be brought, an action against the tenant who paid the rent in his own wrong. *Cunningham v. Laurents*, 1 Bac. Ab. 260. And in an action for use and occupation by a stranger, the title cannot be tried. *Morgan v. Ambrose*, Peake's Ev. 258. And see *Staplefield v. Yewd*; and *Sadler v. Evans*, B. N. P. 133, & *infra*, 113. 4 Bur. 1984.

(*h*) *Lindon v. Hooper*, Cowp. 414.

(*i*) *Knibbs v. Hall*, 1 Esp. C. 84. *Lothian v. Henderson*, 3 B. & P. 520.

(*k*) *Snowden v. Davis*, 1 Taunt. 359. [9 Johns. 201, *Ripley v. Gelston*.]

(*l*) *Bonnell v. Foulkes*, 2 Sid. 4. *Cripps v. Reade*, 6 T. R. 606.

(*m*) *Bize v. Dickinson*, 1 T. R. 285. *Hodgson v. Williams*, 6 Esp. 29.

(*n*) *Cripps v. Reade*, 6 T. R. 606.

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IV.Mistake of
law.

a knowledge of all the facts cannot be recovered on the ground that the plaintiff mistook the law (*o*). (1)

Where the captain of a king's ship brought home in her public treasure, upon the public service, and also treasure of individuals for his own emolument, and received freight for both, and paid over one third of it (according to the usual practice) to the admiral, and having afterwards discovered that the law would not have compelled him to pay the third, brought an action against the executrix of the admiral to recover it back; it was held, that he could not recover back the private freight, because the whole of that transaction was illegal, nor the public freight, because he had paid it under a full knowledge of the facts, although under ignorance of the law, and because it was not against conscience for the executrix to retain it (*p*). (2) Where money has been paid by mistake, which the law would not have compelled the plaintiff to pay, but which in equity and conscience he * ought to have paid, he cannot recover it (*a*). As where he pays a debt otherwise barred by the Statute of Limitations, or a debt contracted during his infancy (*q*).

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A plaintiff who has paid the whole of an attorney's bill, cannot after taxation recover the sum deducted from the bill (*r*). Where a tenant omitted to deduct the property-tax out of his rent, it was held to be a voluntary payment, which he could not recover back (*s*).

(*o*) *Bilbie v. Lumley*, 2 East, 469. *Lowry v. Bourdieu*, Dougl. 467. *Chatfield v. Paxton*, cited 2 East, 470. See also *Gomery v. Bond*, 3 M. & S. 378. Part IV. 1630.

(*p*) *Sir C. Brisbane v. Dacres*, 5 Taunt. 143; and see *Stevens v. Lynch*, 12 East, 38.

(*a*) *Bize v. Dickinson*, 1 T. R. 286.

(*q*) 1 T. R. 286. 2 Fonb. 5. n.

(*r*) *Gower v. Popkin*, 2 Starkie's C. 85.

(*s*) *Denby v. Moore*, 1 B. & A. 123. [3 Moore, 278. S. P.]

(1) [See Evans' Pothier, *Appendix*, 386—407. *Elting v. Scott*, 2 Johns. 165. *Warder & al. v. Tucker*, 7 Mass. Rep. 449. *Garland v. Salem Bank*, 9 ib. 408. *Crain v. Colwell*, 8 Johns. 384. *Donaldson v. Means*, 4 Dallas, 109. Selw. N. P. (Wheaton's ed.) tit. *Assumpsit*.]

(2) [Where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law—it was held that the latter might maintain an action for money had and received, for the expenses paid above the legal fee, or might set off the same in an action by the sheriff against him. *Dew v. Parsons*, 2 B. & A. 562. This was held not to be a voluntary payment. See *Hall v. Shultz*, 4 Johns. 240.]

It is a general rule, that if money be paid to an agent for the use of his principal, the agent who has paid it over is not liable to an action; for it would be unjust that he should lose by the mistake of another (*t*); and the party who made the mistake has his remedy against the principal. But if the party correct his mistake before the agent has paid it over, the agent cannot after notice pay it over without making himself liable. To make this defence available it must appear that the money was paid to the agent expressly for the use of the person to whom he has so paid it over (*u*).

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IV. \

Money received by an agent.

Where an agent receives money for his principal under a claim of right, as for tithe, the right of the principal cannot be tried in an action against the agent, if he can show the least colour of right in the principal; as for instance, his having been some time in possession (*x*).

* Where money is deposited with an agent of the party, his authority is in general revocable; and after countermand, the principal is entitled to recover it. Thus the authority of a stake-holder may be revoked *before* the decision has taken place (*y*), and the stake recovered. * 114

(*t*) See *Horsefall v. Hardley*, 2 Moore, 5. If *A.* give a letter of attorney to *B.* to receive money from *C.*, and bring an action against *C.*, *C.* cannot, except in mitigation of damages, show that he has paid money to *B.* since the action brought, for the bringing the action is a revocation of the authority. B. N. P. 153. 12 Mod. 409.

(*u*) *Snowden v. Davis*, 1 Taunt. 359. Nor will the defence, that the money has been paid over by the agent, be available where it has been corruptly received. *Miller v. Aris*, Selw. N. P. 88. n. See *Sadler v. Evans*, 4 Bur. 1984. *Buller v. Harrison*, Cowp. 565. *Campbell v. Hall*, Cowp. 204. *Pond v. Underwood*, 2 Ld. Ray. 1210. It is no defence by an agent, who has received money for his principal, that the party who paid it could not have been compelled to pay it. Part IV. 120.

An action does not lie against an officer of the revenue in respect of over-payment. *Whitbread v. Brooksbank*, Cowp. 69. Or against a known agent: the remedy ought to be against the superior. Per Lord Kenyon in *Greenway v. Hurd*, 4 T. R. 554. See Part IV. 61. 1620.

(*x*) *Staplefield v. Yewd*, Tr. 27 Geo. II. Cor. Lee, C. J. B. N. P. 133. But if *A.* receive quit-rents for *W.*, and after notice to *A.* not to pay the money over to *W.*, because it is not due, and he afterwards pay it over, the action lies. *Sadler v. Evans*, B. N. P. 133. [See *Potter v. Bemis*, 1 Johns. 515.]

(*y*) Although, as it seems, the wager be legal, for the situation of the stake-holder does not differ from that of an arbitrator, whose authority is countermandable. See *Eltham v. Kingsman*, 1 B. & A. 683. & *vid. infra*, 120. *Aliter*, where the wager has been determined against the plaintiff. *Brandon v. Hibbert*, 4 Camp. 37. [See Mr. Howe's note to *Bland v. Collett*, 4 Camp. 157.]

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Where the drawer of a bill paid the amount to an indorser, to take it up when due, but the bill not having been presented in due time, the drawer directed the indorser not to pay the amount, and offered to indemnify him; and, notwithstanding this, the indorser afterwards paid the bill, it was held that he paid it in his own wrong, and that the drawer might recover the amount (*y*).

On the failure
of considera-
tion itself.

* 115 * Under this count the plaintiff may also show that he has paid money to the defendant upon a consideration which has failed (1). As, for a bill of exchange upon a banker who breaks before it can be tendered to him (*z*). Or for goods which have not been delivered (*a*); or money paid as a deposit on the purchase of an estate, where the vendor cannot make out a title (*b*). So he may recover the money paid as the consideration for an annuity where the deeds for securing it have been set aside for informality (*c*). Or where one of several securities fails (*d*). Or where, having purchased a lease from the defendant, as the supposed representative of the lessee, he is ousted by the real administrator (*e*). But where a personal representative assigned a mortgage-deed, which turned out to be a forgery, for a valuable consideration, but without any knowledge of the forgery, it was held that the purchaser was not entitled to recover the price (*f*).

(*y*) *Whitfield v. Savage*, 2 B. & P. 277.

(*z*) B. N. P. 131. See also *Jones v. Ryde*, 1 Marshall, 157, [5 Taunt. 488. S. C.] where *A.* paid to *B.* a navy bill purporting to be of the value of 1,800*l.*, but which was in reality worth 800*l.* only, a figure having been forged, it was held that *B.* was entitled to recover the difference from *A.*, who was ignorant of the fraud. But where *A. & Co.* bankers, paid the amount of a forged acceptance to an innocent holder for value, it was held that they could not recover the amount. *Smith v. Mercer*, 1 Marshall, 453. [6 Taunt. 76. S. C.]

(*a*) Str. 407; B. N. P. 131.

(*b*) 8 T. R. 516; 3 B. & P. 181. See *Vendor & Vendee*.

(*c*) *Shove v. Webb*, 1 T. R. 732. In such case the deeds should be produced, and their execution proved, and the setting them aside proved by the production of the rule of court.

(*d*) *Scurfield v. Gowland*, 6 East, 241.

(*e*) *Cripps v. Read*, 6 T. R. 606. In such case the assignment should be produced and proved, and the ouster should be proved by evidence of the judgment in ejectment; and the writ of possession, and the revocation of the letters of administration, should be proved.

(*f*) Doug. 655.

(1) [In such case, the sum paid forms the measure of damages—the jury cannot give vindictive damages. *Neel v. Deans*, 1 Nott & McGord, 210.]

A. pays *B.* an annuity for the use of an invention, for which *B.* has obtained a patent, and it afterwards turns out that the patent was void, the invention having been in public use before. *A.* cannot recover the amount so paid (*g*).

Where an article, which the vendee has an opportunity of examining, is sold without fraud, the vendee cannot afterwards recover the price upon discovering that the article was internally defective at the time of sale (*h*).

A putative father giving a note for a fixed sum to the parish officers, who receive the amount, may recover back such part as remains unexpended on the death of the child, as money had and received to his use (*i*). A plaintiff who has paid money on a consideration * not performed, may * 116 either affirm the agreement by a special action for non-performance, or disaffirm it by reason of the fraud, and bring an action for money had and received (*k*).

Where money has been paid by the plaintiff to the defendant, upon a contract which is afterwards *rescinded*, either in consequence of the nature of the contract, or by consent, or by the act of the defendant, then, since the consideration fails, the plaintiff is entitled to recover the money. As, where the plaintiff paid ten guineas to the defendant for a chaise, on condition that it should be returned in case the plaintiff's wife did not approve of it, paying 3s. 6d. per day. In the mean time the plaintiff's wife disapproving of it, the chaise was sent back to the defendant after three days, and left on his premises without his consent, and the 3s. 6d. per day was tendered, which the defendant refused to receive; and it was held that the plaintiff was entitled to recover the ten guineas (*l*). And in *Giles v. Edwards* (*m*), where the defendant by his neglect prevented the plaintiff from carrying a special agreement between them, for the sale of cord-wood to the plaintiff, into execution, it was held that the plaintiff might recover the sum which he had paid under the contract, as money had and received to his use. So, it was held, in *Dutch v. Warren* (*n*), where the defendant had refused to transfer to the plaintiff five shares in the Welsh Copper Mines accord-

Rescinded
contract.

(*g*) *Taylor v. Hare*, 1 N. R. 260.

(*h*) *Bluett v. Osborne*, 1 Starkie's C. 384.

(*i*) *Watkins v. Hewlitt*, 1 Bing. 1.

(*k*) B. N. P. 132.

(*l*) *Towers v. Barrett*, 1 T. R. 183.

(*m*) 7 T. R. 181.

(*n*) Cited 2 Burr. 1010.

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IV.Contract still
open.

* 117

Recovered by
legal process.

ing to his agreement, under which the plaintiff had paid him the price.

Where, however, the terms of the special contract are still open, this action does not lie. As, where money is paid as the price of a horse warranted sound, * which turns out to be unsound (*o*), for an action for money had and received is not a proper form of action to try the warranty. So, in the case of *Cooke v. Munstone*, above cited (*p*), it was held that the money which had been paid for the delivery of the soil could not be recovered, whilst the contract for the soil remained still open.

It is a general rule, that money recovered by means of legal process cannot be recovered, although it be afterwards discovered that it was not due (*q*). (1) But the action lies

(*o*) *Power v. Wells*, Doug. 24, n. Cowp. 818. *Weston v. Downes*, 1 Doug. 23. *Payne v. Whale*, 7 East, 274. 1 T. R. 133. [*Byers v. Bostwick*, 2 Rep. Con. Ct. 75. acc.]

(*p*) 1 N. R. 351. See also *Hull v. Heightman*, 2 East, 145, *supra*, 84. *Vide etiam*, *Brown v. McKinnally*, 1 Esp. C. 279: Where the money was paid under a protest that it was paid without prejudice.

(*q*) *Marriott v. Hampton*, 7 T. R. 269. See *Moses v. Macfarlane*, Burr. 1006; B. N. P. 130. *Thorp v. How*, Ibid. [Mr. Day's note to *Marriott v. Hampton*, 2 Esp. C. 546.]

(1) [Where a defence is made, in an action on a promissory note, that the maker was deceived in the article for which the note was given, and judgment is rendered for the plaintiff; the defendant cannot afterwards recover damages for the supposed deceit, in a separate action—the question having been decided in the first action. *Jones v. Scriven*, 8 Johns. 453. So where A. gave B. a promissory note payable on demand, which B. transferred to C. after A. had paid it, and C. sued A. and recovered the amount—it was held that A. could not recover of B. the amount of the note, in an action for money had and received, but that he should have defended the action brought by C. *Loomis v. Pulver*, 9 Johns. 244. *S. P. White v. Ward & al.* 9 Johns. 232. *Le Guen v. Gouverneur & al.* 1 Johns. Cas. 436. *Cobb v. Curtis*, 8 Johns. 470. *Bentley v. Morse*, 14 Johns. 468. But if a plaintiff recover by means of the defendant's inability or neglect to produce an existing receipt for the money sued for, and afterwards promise the defendant that he will refund the money, on the production of the receipt—such promise is valid and will support an action. 14 Johns. *ubi sup.*

An action for money had and received does not lie to recover back money received under a judgment in a foreign attachment laid in a foreign country, however erroneous the decision may be, *Rapelye v. Emory*, 2 Dallas, 231. S. C. under the names *Messier v. Amory*, 1 Yeates, 533. But see *Wright v. Towers*, 1 Browne's Rep. Appx. 1.

Where A. extended an execution on B.'s real estate and became tenant in common thereof with C.—and afterwards obtained a judgment against C. for a share of the rents and profits accruing after

against an overseer of the poor to recover money in his hands, levied under a conviction which has since been quashed (*r*). (1) So it lies to recover money paid under a compromise of an action; the compromise having failed, and another action having been brought (*s*).

Where the holder of a bill of exchange, being a trustee for the plaintiff, sued the drawer, and after his bankruptcy, his assignees recovered against the sheriff for an escape damages to the amount of the bill, it was held that the plaintiff might recover the damages from the assignees, allowing them the costs and expenses (*t*).

It seems to be a general rule, that where money has been paid by the plaintiff to the defendant, on a consideration, which is illegal in itself, as being prohibited by some statute, but where the plaintiff does not stand *in pari delicto* with the defendant, and cannot be considered as *particeps criminis*, the money may be * recovered. And therefore, * 118 where a statute is made for the protection of persons standing in the plaintiff's situation, the party injured may, even after the transaction prohibited by the statute has been finished and completed, recover the money so paid. And here the law acts in furtherance of the provisions of the statute; hence a debtor may recover from a creditor all the usurious interest which he has paid beyond legal interest (*u*).

So the plaintiff may recover the premiums for illegal insurances of numbers in a lottery after the chances have terminated in his favour, since the contract is not criminal, By one not particeps.

(*r*) *Feltham v. Terry*, cited in *Birch v. Wright*, 1 T. R. 387; and B. N. P. 131. See also p. 171, note (*n*).

(*s*) *Cobden v. Kenrick*, 4 T. R. 432.

(*t*) *Randall v. Bell*, 1 M. & S. 714, Ld. Ellenborough, *dissentiente*.

(*u*) Per Ld. Mansfield, in *Smith v. Bromley*, Doug. 696, (*n*); B. N. P. 133. *Lowry v. Bourdieu*, Doug. 471. The authority of *Tomkyns v. Barnet*, Skinn. 411, and Salk. 22, has frequently been denied. In *Clarke v. Shee*, Cowp. 199, Ld. Mansfield said that it had been denied a thousand times. And see *Alsop v. Milton*, Sel. N. P. 89, 4th edit.

the extent—upon the subsequent reversal of A.'s judgment against B., C. in an action for money had and received, recovered back the rents and profits paid by him to A. though the judgment of A. against C. remained unreversed. *Lazell v. Miller*, 15 Mass. Rep. 207. See Ante Vol. I. p. 200, note (2).]

(1) [So money paid on a judgment, which was afterwards reversed, may be recovered back, in Maryland, in an action for money had and received, unless it was equitably due when the judgment was rendered. *Green v. Stone*, 1 Har. & J. 405.]

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Illegal conside-
ration.

plaintiff, in order to avoid a prosecution for a misdemeanor, paid a sum of money to the defendant for the use of the poor, it was held, that after notice not to pay the money over he might recover it (*h*).

Where the defendant, a broker, had received from the underwriters the amount of an illegal insurance, it was held that he could not set up the illegality of the transaction as a defence in an action by the assured (*i*). For having received money to the use of another, he cannot in conscience retain it, and * no one is entitled to it but the plaintiff. So, where the defendants, who were carriers, received for the plaintiffs the price of a quantity of counterfeit half-pence, it was held that the plaintiff was entitled to recover, and the illegality of the transaction was considered as unimportant to the decision of the question (*k*), since the plaintiff sought but to recover his own.

In the case of *Booth v. Hodgson* (*l*), *A. B.* and *C.* being partners in underwriting insurances, which were underwritten in the name of *A.* alone; *C.*, one of the partners, and *D.* as the brokers of *A. B.* and *C.*, received premiums of insurance to their use, and it was held that *A.* was not entitled to recover the amount of those premiums from *C.* and *D.* as money had and received to his use. Here it is to be observed, that the party could not recover except through the medium of the illegal transaction, and the case differs from that of money paid to a mere agent of the plaintiff where the illegality of the transaction is out of question.

In the case of *Sullivan v. Greaves* (*m*), the plaintiff and one *Bristow*, being partners in an insurance underwritten by the plaintiff in his own name, a loss happened, and the plaintiff paid the whole to the defendant, a broker; *Bristow* afterwards paid his moiety of the loss to the broker, and then the plaintiff brought his action against the broker to recover half of what he had paid; and Lord Kenyon held, that since the plaintiff came to enforce an illegal contract he could not recover (*n*). This case may seem at

(*h*) *Taylor v. Lendey*, 9 East, 49.

(*i*) *Tenant v. Elliott*, 1 B. & P. 3. The case was distinguished from that of a stake-holder.

(*k*) *Farmer v. Russell*, 1 B. & P. 296.

(*l*) 6 T. R. 405.

(*m*) Park on Ins. 8.

(*n*) Ld. Kenyon afterwards mentioned the case to the other Judges of the Court of K. B., who approved of it; and the doctrine was recognized and approved of by the Court of C. P. in the case of *Mitchell and others v. Cockburn*, 2 H. B. 379.

first view * to be inconsistent with that of *Tenant v. Elliott* (o); but it appears to be distinguishable from it; for there the ground of the decision was, that the agent of the plaintiff having received money for his use, the illegality was out of the question; it was the plaintiff's own money; but in the latter case the plaintiff sought to recover money which he had paid under an executed illegal agreement; before *Bristow's* payment of the money, the plaintiff, for the reason just stated, was not entitled to recover any part of it; and when *Bristow* paid the money he did not actually pay it to the plaintiff's use, as in the case of *Tenant v. Elliott*; and the law will not raise an implied assumpsit in favour of a *particeps criminis*.

But money paid over to a party cannot be recovered after the event has happened; for where the parties are in *pari delicto*, *melior est conditio possidentis*. And therefore a plaintiff cannot recover from the underwriter the premium of a re-assurance void by statute (p) after capture (q). So, where an insurance was made on a ship belonging to a British subject, without interest (r), it was held that the assured could not recover the premium after the ship had arrived safe (s). And in such cases it is presumed that all parties know the law, and the municipal laws of this country are as binding in that respect upon foreigners as upon natives (t).

Illegal executed consideration.

Where, however, an insurance has been effected in ignorance of particular facts which avoid the * policy, it has * 123 been held that the premium may be recovered (u).

So, where money has been paid by an illegal insurer of lottery tickets, in consequence of having insured the defendant's tickets, it was held that the plaintiff could not recover, because the contract was executed; and the dis-

(o) 1 B. & P. 3. and *supra*, 120. See Mr. Selwyn's quære, 1 Selw. N. P. 4th edit. 90.

(p) 19 Geo. II. c. 37.

(q) *Andree v. Fletcher*, 3 T. R. 266. *Webb v. Bishop*, B. N. P. 132.

(r) Which is illegal by 19 Geo. II. c. 37.

(s) *Lowry v. Bourdieu*, Doug. 467. See also *Lubbock v. Potts*, 7 East, 449.

(t) *Andree v. Fletcher*, 3 T. R. 266. *Morck v. Abel*, 3 B. & P. 36. *Vandyck v. Hewitt*, 1 East, 96, where the money was paid on an illegal insurance to cover a trading with the enemy, and the plaintiff declared on the policy as well as on the money-counts.

(u) *Hentig v. Staniforth*, 1 Starkie's C. 254. [S. C. 5 M. & S. 122.] *Oom v. Bruce*, 12 East, 225, [and Mr. Day's notes to that case.]

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IV.

Account stated.

inction was taken between that case and that of a plaintiff who seeks to recover premiums paid for such illegal insurances (*x*).

The count, upon *an account stated*, is supported by evidence of an acknowledgment on the part of the defendant of money due to the plaintiff, upon an account between them. A promissory note given by the defendant to the plaintiff, is evidence under this count, even where the note cannot be given in evidence under a special count, because of variance (*y*). It is unnecessary to prove the items of which the account consists, but sufficient to prove the account stated (*a*); for the stating of the account is the consideration of the promise (*b*). And therefore an action upon this count cannot be maintained against an infant (*c*), for since an infant cannot state an account, the consideration fails.

It is sufficient, although the account be stated of that which is due to the plaintiff only, without making deduction for any counter-claim by the defendant (*d*).

* 124 * It is also sufficient that the account be stated with the wife of the plaintiff (*e*).

After an account has been liquidated between two partners, assumpsit will lie for the balance upon an account stated, and a promise to pay, although the partnership-deed contains a covenant between the parties to account at certain times (*f*); for if a partnership be dissolved, and an account settled, it is a good consideration for a promise to pay (*g*). And it seems that it is immaterial in what way the debt arose if there be an account stated,

(*x*) *Browning v. Morris*, Cowp. 790.

(*y*) See tit. *Bills of Exchange*.

(*a*) *Bartlett v. Emery*, Hil. 2 G. II. B. R.—1 T. R. 42, *n*.

(*b*) B. N. P. 129. *May v. King*, 12 Mod. 537, where the evidence was, that the parties had come to an account, and that 5*l*. was due on the balance; and held, that the plaintiff was entitled to recover on that count. Per Buller, *J. Truman v. Hurst*, 1 T. R. 40.

(*c*) *Truman v. Hurst*, 1 T. R. 40. In *Ingledeu v. Douglas*, 2 Starkie N. P. C. 36, *Ld. Ellenborough* held, that an account stated by an infant was not evidence after he had attained his age, even to show that he had had the necessaries mentioned in the account.

(*d*) *Styart v. Rowland*, 1 Show. 215.

(*e*) 1 Show. 215. B. N. P. 129.

(*f*) *Moravia v. Levy*, 2 T. R. 483, (*n*).

(*g*) *Foster v. Allanson*, 2 T. R. 479. And a judgment in that action might be pleaded in bar of any action on the covenant, per Buller, *J.* 2 T. R. 483. [See 14 Mass. Rep. 99. 15 *ib.* 121.]

and an express promise to pay the balance (*h*). But in general, so long as any partnership concerns remain unadjusted, no action can be maintained by one partner against another (*i*).

Where the plaintiff had sold a ship to the defendant who became the sole registered owner, and afterwards, by way of security to the plaintiff for advances for the ship, executed a bond conditioned for making a bill of sale to the plaintiff, which he failed to do, and subsequently sold the ship to a third person; and on being applied to by the plaintiff, promised to render to him an account of the produce of the sale and disbursements, it was held to be evidence that he had sold the ship on account of the plaintiff, and an admission of his liability to pay over the balance in his hands (*k*).

* Where an account was stated between the defendant and his wife with the plaintiff, of an account due from the wife whilst sole, to the plaintiff, for goods sold, it was held that the action could not be maintained against the husband alone (*l*). So, the plaintiff cannot recover against the defendant upon an account stated by him, partly as administrator, and partly in his own private capacity (*m*). * 125 Parties.

Where the defendant dealt with *B.*, and then with *B.* and *C.*, his partner, and an account was settled between the defendant and *B.* and *C.*, which included both the accounts, it was held that *B.* and *C.* might maintain an action on this account (*n*).

And the plaintiff may recover on an account stated with the defendant, including debts due from the defendant

(*h*) In *Foster v. Allanson*, where the partnership had been dissolved, and an account stated, which the defendant *promised to pay*, Buller, J. distinguished the case from that of *Drue v. Thorn*, Aleyn, 72, on the ground of the express promise. In that case a feme sole being indebted to the plaintiff for goods, married, and she and her husband stated an account with the plaintiff, which the husband promised to pay, and it was held that the wife must be joined. [See 15 Johns. 403.]

(*i*) *Foster v. Allanson*, 2 T. R. 479. *Robson v. Curtis*, 1 Starkie's N. P. C. 78. [See 12 Mass. Rep. 34.]

(*k*) *Prouting v. Hammond*, 1 Gow's C. 41.

(*l*) *Drue v. Thorne*, Aleyn, 72. But Buller, J. in *Foster v. Allanson*, 2 T. R. 483, intimated that it would have been otherwise if the defendant had expressly promised to pay.

(*m*) *Herrenden v. Palmer*, Hob. 88.

(*n*) *Moor v. Hill*, Sitt, Guildhall after Easter, 1795; Peake's Ev. 257, 3d edit. *Qu.* whether there was not an express promise in this case to transfer the credit to the new firm, and pay the consolidated account.

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alone, and from the defendant and a deceased partner jointly (o).

An admission by the defendant that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and carried away by the defendant, is evidence under this count (p).

Variance.

A variance in evidence between the amount of the balance proved, and that averred in the declaration, is now held to be immaterial (q).

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* Interest is not recoverable in the absence of a contract, express or implied, for the payment of interest on the balance (e).

Breach.

An omission to prove the whole breach, as alleged in the declaration, is not material. The plaintiff in an action upon a policy of insurance may allege a total loss, and recover for a partial or average loss (r).

Where the breach alleged, that the defendant had treated the estate contrary to good husbandry, and the custom of the country, it was held to be supported by showing that the defendant had treated it contrary to the prevalent

(o) *Richards v. Heather*, 1 B. & A. 29.

(p) *Knowles v. Michel*, 13 East, 249. But not for goods sold and delivered, *Ibid.*; and see *Lee v. Risdon*, 7 Taunt. 188. An acknowledgment of a single item in an account is sufficient to support the count. *Highmore v. Primrose*, 5 M. & S. 65. An account alters the nature of the debt. 1 Vent. 268; Aleyn, 73; 2 Lev. 110. If a tenant being in arrear of rent settles an account with his landlord, and promises to pay him, *assumpsit* lies. Roll. Abr. 9; Bro. Account, 81; T. Ray. 211; 2 Keb. 813. [See Clayt. 87, *Kirbie v. Emerson*.]

Although it appear that there was a memorandum of agreement for the sale of growing trees, but neither stamped nor signed, an admission of the sum due, after the trees have been cut and carried away, is evidence. *Teale v. Auty*, 2 B. & B. 99. Secus, if no precise sum be admitted. *Ibid.* So on an agreement for purchase of furniture and fixtures, the inventory containing a mixed valuation of goods and fixtures, the plaintiff may recover the value on this count. *Salmon v. Watson*, 4 Moore, 73. But not on the count for goods sold and delivered. *Semble*, *ib.*

Plaintiff and defendant agree to buy goods on their joint account, the defendant agreeing to furnish the plaintiff with half the amount in time for payment; the plaintiff having paid the whole, may recover the moiety, although an account is still to be taken between them as partners on the disposal of the whole stock. *Venning v. Leckie*, 13 East, 7.

(q) *Thompson v. Spencer*, B. N. P. 129.

(e) *Nichol v. Thompson*, 1 Camp. 52. n. *Dawes v. Pinner*, 2 Camp. 486, n. *Moore v. Voughton*, 1 Starkie's C. 487.

(r) *Gardiner v. Croasdale*, 2 Burr. 905; and see the cases, 2 Will. Saund. 205; Bl. 198.

course of good husbandry in that neighbourhood, as by tilling half his farm at once, when no other farmer tilled more than one third ; and that it was not necessary to prove any precise definite custom or usage, in respect to the quantity tilled (s).

In an action against a defendant, as wharfinger, for not procuring a sufferance for goods, in consequence whereof the goods were seized as forfeited to the king, it appeared that it was the defendant's duty, as wharfinger, to obtain a sufferance from the custom-house for the shipping of the goods, which he had not done, and in consequence of which the right of seizure had attached. It was also proved, that the goods had been seized by a custom-house officer, and sold in the usual manner. It was objected, that the record of a sentence of condemnation ought to be proved, but it was held that the proof was sufficient (t).

By the plea of *non assumpsit* the defendant puts the plaintiff to the proof of his whole case, and in answer he may in general adduce any evidence which disproves the case set up by the plaintiff, and shows that * at the time when the action was brought the plaintiff had no cause of action, or at least no right to maintain this form of action.

Proof on non
assumpsit.

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He may show that the agreement was under hand and seal, for then the form of action is mistaken (x) : That the action has not been brought by the proper parties, the promise having been made to the plaintiffs jointly with others (y) (1). That the plaintiff who sues as a feme sole was married when the contract was made (z) : That one of the defendants did not promise jointly with the rest (2). That the action was commenced before the cause of action arose (a).

Proof by the
defendant under
the plea of
non assumpsit,

The defendant may controvert the promise in fact by

(s) 4 East, 154.

(t) *Baker v. Liscoe*, 7 T. R. 171.

(x) Law of Ev. 183. Cro. J. 506, 508. Hutt. 34. 1 Brownl. 14. [*Davis v. Gibson*, Cam. & Nor. 102.]

(y) Gilb. Law of Ev. 189. Tri. per Pais, 187. B. N. P. 152, on the ground of variance.

(z) 3 Camp. 438.

(a) 2 Lord Ray. 1249.

(1) [*Baker v. Jewell*, 6 Mass. Rep. 462. 7 Mod. 360. (Leach's ed.) 2 Stra. 1146. 820. 2 Show. 446. 2 T. R. 282. 1 Taunt. 7. 7 T. R. 254. acc.]

(2) [*Tom v. Goodrich*, 2 Johns. 213. 1 East, 48. So in actions *ex quasi contractu*. 2 N. R. 454. 12 East, 452.]

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evidence tending to show that none such was ever made, or if in fact made, may avoid it in point of law, by proof that it was obtained by duress, or whilst the party was in a state of intoxication, or by proof of infancy (*b*), coverture (*c*), or lunacy (*d*).

Or he may show that the promise has been discharged by the plaintiff before breach (*e*), or by a subsequent contract inconsistent with the former. Thus, if *A.* promise to marry *B.* within three months, and it is afterwards agreed that he shall marry her in half a year, this will discharge the former promise; for by taking * the latter promise of a longer time, the parties must be supposed to intend to discharge the former, for otherwise the latter could have no intent at all (*f*):

Or that it has been discharged by accord and satisfaction (*g*), or by a release (*h*), or that it has merged in some higher security (*j*):

(*b*) Gilb. Law of Ev. 186. 2 Lev. 144. Tri. per Pais, 398. 1 Ld. Raym. 389. 1 Salk. 279. B. N. P. 152.

(*c*) Gilb. Law of Ev. 183. *Cowley v. Robertson and Mary* his wife, 3 Camp. 438, where it was proved in bar, that when the goods were supplied to the defendant Mary, she was the wife of one Gilley, who was still living.

(*d*) Gilb. C. P. 65. 2 Stra. 1104.

(*e*) And this may be proved by parol agreement; but after a breach, it cannot be discharged by any new agreement without a deed, unless it operate in satisfaction. B. N. P. 152. 3 Lev. 244. 1 Mod. 262. 2 Mod. 259. 12 Mod. 538.

(*f*) Gilb. Law of Ev. 193. Tri. per Pais, 402. But a second promise to marry in a fortnight would not discharge the former, Ibid.

(*g*) 1 Salk. 140. B. N. P. 152. 1 Ld. Ray. 566. See tit. *Accord and Satisfaction*, *supra*, 25.

(*h*) B. N. P. 152. Doug. 107.

(*j*) Vide *Pudsey's Case*, cited 2 Leon, 160, 3 East, 258. Where the contract is under seal *assumpsit* does not lie, for the law will not raise an *assumpsit* where the party resorts to a higher security. Therefore, if the obligor of a bond, without some new consideration, as forbearance, promise to pay the money, *assumpsit* will not lie. *Toussaint v. Martinnant*, 2 T. R. 100. There the surety took a bond from the principal. So where a sum is due for freight and demurrage under a specialty contract, the plaintiff cannot recover in *indebitatus assumpsit*. *Atty v. Parish*, 1 N. R. 104. But a freighter may recover against ship-owners for negligence, although the captain (one of the ship-owners) has entered into a charter-party under seal, with the plaintiff; *Leslie v. Wilson*, 3 B. & B. 171. For ship-owners are chargeable upon their general liability in respect of the duties which belong to them as such, and which are not inconsistent with the charter-party. The only exception to the rule is an action of *debt* for *rent*, and that rests on the consideration that by the demise an interest in the land passes. 1 N. R. 104; and

That the performance became impossible, by the act of God; as that a horse hired by the defendant for a journey died on the journey, without the defendant's fault (*g*):

He may show that no consideration ever existed; or that it has wholly failed through the negligence of the plaintiff (*h*); or was insufficient in law, or illegal, as being founded on an usurious or stock-jobbing contract (*i*); or, lastly, he may prove that the promise has been performed, as by payment or the delivery of the thing contracted for (*k*).

* The defendant cannot under this issue give evidence * 129 of any matter which arose after the commencement of the

vide Hardr. 332; *Warren v. Consett*, 8 Mod. 107; Com. Dig. tit. Pleader (*o*), 15; *Kemp v. Goodall*, 1 Salk. 277. Hence in an action for rent due under a demise by deed, *nil debet* is a good plea. *Ib.* Where the obligor of a respondentia bond, by indorsement upon it, agreed to pay the money to *any assignee*, it was held that an assignee might maintain *indeb. assumpsit*; *Fenner v. Mears*, 2 Bl. 1269. But this has been doubted by Lord Kenyon, in *Johnson v. Collins*, 1 East, 104; and Bayley, J. *White v. Parkins*; 12 East, 582. [See 12 Johns. 281.] But where there is a subsequent parol agreement not inconsistent with the deed, and founded on a sufficient consideration, *assumpsit* lies. See *Leslie v. De la Torre*, cited 12 East, 583. *White v. Parkins*, 12 East, 578.

A guarantee by the deed of a third person is no merger. *White v. Cuyler*, 1 Esp. C. 200. 6 T. R. 176.

(*g*) Gilb. Law of Ev. 187. Tri. per Pais, 399. *Secus*, where performance was impossible at the time of the promise, Com. Dig. Action on the case on *assumpsit*, G. and see Com. Dig. Condition, D. 1. And a plaintiff cannot show that performance of the consideration became impossible by the act of God. *Ib.*

(*h*) See tit. *Goods sold and delivered*.—*Negligence*.—*Work and Labour*. *Grimaldi v. White*, 4 Esp. C. 95. *Basten v. Butter*, 7 East, 479. *Farnsworth v. Garrard*, 1 Camp. 38. *Fisher v. Samuda*, *Ibid.* 190. *Lewis v. Cosgrave*, 2 Taunt. 2. The inference from these cases seems to be, that where a specific contract is made for a specific thing, at a specific price, and the contract be not performed, the party must either rescind the contract in toto, or pay the price; but that where there is no specific contract, and the plaintiff proceeds on a *quantum meruit*, he must recover according to the value of the work, or the article to the defendant; and consequently where there has been no beneficial service, he is not entitled to recover any thing. Forbearance to sue the defendant where there was no cause of action is no consideration. *Hammond v. Roll*, March, 202; 1 Inst. 232; *Tooley v. Windham*, Cro. Eliz. 206; *Barber v. Fox*, 2 Saund. 136; *Lloyd v. Lee*, 1 Str. 94; *Stone v. Wythypol*, Cro. Eliz. 126. *Secus*, where the right is doubtful. *Longridge v. Dorville*, 5 B. & A. 117.

(*i*) *Supra*, 87.

(*k*) B. N. P. 152. Salk. 140. 1 Ld. Ray. 566. Although it was once held that performance must be pleaded, *ibid.* and 1 Mod. 210. See tit. *Payment*.

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action, not even payment of the debt and costs, except for the purpose of diminishing the damages which in such case would be merely nominal (*i*). So for the same purpose he may give in evidence any other payment (*k*). The Statute of Limitations will be no bar under this issue, although it appear from the plaintiff's own showing, or even from the declaration itself, that the cause of action did not arise within the six years (*l*).

The fact that others who are not joined contracted jointly with the defendant, is available by plea in abatement only; if it be proved it shows no variance; for it is still true as alleged, that the defendant undertook and promised (*m*).

The usual pleas are, a tender of the money before action brought; the Statute of Limitations; a set-off; infancy (*n*); coverture (*o*).

ATTAINDER of *Felony*

Is pleadable in bar against a demand accruing after the attainer (*p*). The proof is by the record of the judgment (*q*). For the effect of an attainer as to competency, see title *Infamous Witness*; and see also tit. *Certificate*.

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* ATTORNEY.

Proof that the plaintiff is an attorney.

IN an action by an attorney for slandering him in his profession, he may prove that he is an attorney by means of an examined copy of the Roll of Attornies (*r*), or by the book of admissions from the master's office (*s*). But it is sufficient to prove that he has acted as an attorney of the

(*i*) *Holland v. Jourdine*, Holt C. 6. In the King's Bench, either the *latitat*, or the filing the declaration, may be considered the commencement of the action.

(*k*) B. N. P. 153. 2 Lev. 81.

(*l*) B. N. P. 152. 1 Will. Saund. 283, n. 2. Ib. vol. 2, 63, a. 1 Salk. 278.

(*m*) 1 Will. Saund. 291, in note, *contra*. Gilb. L. Ev. 189. Vent. 52. And see B. N. P. 152.

(*n*) The evidence applicable to these will be considered under those respective titles.

(*o*) See *Husband and Wife*.

(*p*) *Bullock v. Dodds*, 2 B. & A. 273.

(*q*) *Vide* Vol. I. 150—245.

(*r*) 4 T. R. 366. When an attorney is admitted and takes the oath, he subscribes his name upon the roll. 2 Esp. C. 596.

(*s*) This contains the names copied from the original roll, and is

court of which he is alleged to be an attorney (*t*). And if the defendant's words assume that the plaintiff is an attorney, it operates as an admission that he is so, and supercedes the necessity of other proof (*u*).

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In an action by an attorney on his bill, he must prove his *retainer* by the defendant, which may be proved by evidence that the defendant attended at the plaintiff's office, and gave directions from time to time whilst the business was going on. Undertaking to pay what is due is an admission of a retainer; and therefore in an action on the bill, the production of the Judge's order for taxation, the defendant's undertaking, and the master's *allocatur*, is sufficient evidence of the fact. He should next prove that the business was done as stated in the bill, which is usually proved by a clerk, or other agent who was concerned in the management of the suit or business, without proving the bill, item by item. If no part of the charge be for business done in court, evidence must also be given of the reasonableness of the charges; but if any one item be for * business done in court (*x*), he must prove the delivery of a bill to the defendant (*y*), according to the stat. (*z*), or that he left one

Proofs in actions for costs.

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admissible for the purpose of such proof upon an indictment for perjury. *R. v. Crossley*, 2 Esp. C. 526.

(*t*) *Berryman v. Wise*, 4 T. R. 366.

(*u*) P. C. *ibid*. In proving A. to be an attorney, it is not necessary to prove that he has taken out his certificate. *Jones v. Stevens*, Ex. Trin. T. 1822.

(*x*) 6 T. R. 645. Peake's C. 102. As where it was due for a *dedimus potestatem*, (1 N. R. 266, *ex parte Prickett*), or for preparing a warrant of attorney to confess a judgment. (*Sandom v. Bourne*, 4 Camp. 68.) [*Sed vide Burton v. Chatterton*, 3 B. & A. 486.] But if part be for conveyancing, and he deliver no bill, he may recover for the conveyancing only. (2 B. & P. 345.) Charges for drawing an affidavit of debt, and getting it sworn, are for business done in court. (6 T. R. 645.) So obtaining the chancellor's signature for obtaining a bankrupt's certificate is business done in court. *Collins v. Nicholson*, 2 Taunt. 321. Where an attorney had delivered no bill, but had delivered a bill of particulars of demand under a Judge's order, it was held that he was entitled to recover for monies paid for his client's use, having no reference to his business of an attorney, although there were other items which were taxable. *Mowbray v. Fleming*, 11 East, 285.

(*y*) Where there were two defendants not partners, held to be sufficient to deliver the bill to the one who managed the business. 2 Camp. 277. Where several parties have a joint interest in resisting a claim for tithes, though their individual interests be separate, and jointly retain an attorney, the delivery of the bill to the party who actually retains him is sufficient. *Oxenham v. Lemon*, 2 D. & R. 461; see *Snowden v. Shee*, 1 Camp. 437.

(*z*) 2 Geo. II. c. 23, s. 23.

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Delivery of a bill.

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Proof of delivery of bill.

at his dwelling-house (*a*) or last place of abode; subscribed by him, one month (*b*) or more previous to the commencement of the suit. It is sufficient to show that a bill was left at the defendant's last known apparent place of abode at the time when the bill was delivered (*c*), although the defendant prove that he had another known place of abode subsequently to the delivery of the bill. It must be proved that the bill was *left* with the client, and not taken back again (*d*). Where a bill was produced, with an indorsement upon it in the hand-writing of a deceased clerk of the plaintiff, whose duty it was to have delivered the bill, purporting that he had delivered a copy on a particular day, and the indorsement was proved * to have existed at that date, it was held that the entry was evidence of the delivery of the bill (*e*). It is unnecessary for an executor or administrator to prove the delivery of a bill for business done by his testator or intestate (*f*), so where the defendant is also an attorney (*g*): nor is such proof necessary where the attorney sets off the amount of his bill; it should not however be produced at the trial by surprise, but be delivered time enough for the plaintiff to have it taxed before the trial (*h*). Where duplicate originals are made out at the same time, one may be given in evidence, without notice to produce the one delivered (*i*), provided proof be given that it was signed by the plaintiff. A mistake in the date of the items, which does not mislead the plaintiff, will not vitiate the delivery (*k*).

An action may be maintained by a solicitor against an assignee for business done under a commission of bank-

(*a*) Leaving at the country-house is not a good delivery. *Hill v. Humphries*, 2 B. & P. 343.

(*b*) A lunar month sufficient. *Hurd v. Leach*, 5 Esp. C. 168.

(*c*) *Wadeson v. Smith*, 1 Starkie's C. 324.

(*d*) 1 H. Bl. 290.

(*e*) *Champneys v. Peck*, 1 Starkie's C. 404.

(*f*) 1 Barnard. K. B. 433. Andr. 276. 1 Tidd, 316.

(*g*) Although the business was done before the defendant became an attorney. *Ford v. Maxwell*, 2 H. B. 589. 1 Esp. C. 420. 12 G. II. c. 13. *Bridges v. Francis*, Peake, 1; 1 Esp. C. 221.

(*h*) Dougl. 199. 1 Esp. C. 499. 1 Tidd, 318. *Bulman v. Birket*, 1 Esp. C. 449.

(*i*) *Anderson v. May*, 2 B. & P. 237. And see *Jory v. Orchard*, 2 B. & P. 39; *Philipson v. Chase*, 2 Camp. 110. *Vide supra*, vol. I. p. 359.

(*k*) *Williams v. Barber*, 4 Taunt. 806.

ruptcy, although the bill has not been taxed by a master in chancery under the stat. 5 Geo. II. c. 30, s. 45 (l).

It is a general rule in such cases, that the bill cannot be taxed at the trial, for the defendant might have had it taxed previously, and his delay for the space of a month before the commencement of the action is * evidence of his acquiescence (m). The defendant cannot set up the plaintiff's negligence in the conduct of the cause as a defence (n). The delivery of a former bill is conclusive evidence against any increase of charge in a subsequent bill, on any of the items contained in it (o), and is strong presumptive evidence against any additional items (p); but it will not estop the plaintiff from proving that in fact he had transacted other business for the defendant.

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The plaintiff must also prove that the action was not commenced till a month after the delivery of the bill, by the production of the writ, or by the Nisi Prius roll (q).

In an action against an attorney for misconduct, it must be proved that he is an attorney of the particular court as alleged in the declaration (r). The retainer of the defendant by the plaintiff must also be proved.

Proof in actions against an attorney.

With respect to the misconduct of the defendant, and proof of the loss which has resulted in consequence, it is to be observed, that it is not every neglect which will subject the party to such an action. An attorney is only bound to

(l) *Tarn v. Heys*, 1 Starkie's C. 278. See *Arrowsmith v. Barford*, Ibid. in note; 2 Camp. 277. An attorney may recover the costs of a commission of bankrupt, though he be not a solicitor in chancery. *Wilkinson v. Diggell*, 1 B. & C. 158.

Semble, he cannot recover if he abandon his client before trial, per *Ld. Eldon, C.*; *Creswell v. Byron*, 14 Ves. 271; *vid etiam*, 1 Sid. 31; *Say*. 173. Or if he carry on business at a remote place by a clerk whom he pays by a portion of the profits. *Hopkinson v. Smith*, 1 Bing. 15.

(m) *Doug*. 199. *Barnes*, 124. 1 *Tidd*, 317. *Anderson v. May*, 2 B. & P. 237. *Qu.* as to the reasonableness of this rule.

(n) *Templer v. McLachlan*, 2 N. R. 136, unless at least it was so gross as to deprive the defendant of all possible benefit from the cause; and *qu.* whether even in that case. [See *Runyan v. Nichols*, 11 Johns. 547.]

(o) *Lee v. Jones*, 2 Camp, 496.

(p) *Loveridge v. Botham*, 1 B. & P. 49.

(q) See *Writ.—Commencement of Action*. *Webb v. Prickett*, 1 B. & P. 263.

(r) As to this proof, see above, 130. It is said that a bill for business done in a particular court is not evidence that the party was an attorney of that court. *Green v. Jackson*, *Peake's C.* 236. But *qu.*

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the same kind of practice may be examined as witnesses on either side (a).

If the ground of action be negligence in completing a conveyance, where there is a defect in the memorial of an annuity, in consequence of which it is set aside, the plaintiff, to prove the defect, after having proved the retainer of the defendant, his conduct of the business, and the execution of the deeds, which should be produced, should prove the rule of court ordering it to be set aside, and an examined copy of the affidavits used upon the motion. So, if the plaintiff has been evicted in consequence of a defect in title, arising from the negligence of the defendant, he should produce the deeds, and prove the execution of them and the payment of the money, and show that he has been evicted by proof of the judgment in ejectment, the execution of the writ of possession, producing the writ or an examined copy, if it has been returned.

An action of this nature sounds in damages, and the jury are not to give a verdict for the whole original debt, but only such damages as are commensurate with the loss, which has probably resulted from the defendant's negligence (b.) And therefore the plaintiff * should be prepared with evidence to show the probability that he should have recovered the whole or part of the debt, if the defendant's negligence had not intervened, as by evidence of the circumstances of the party indebted to him.

Competency of.—On grounds of policy, as has already been seen, an attorney is not allowed to disclose the secrets of his client; [see *Confidential Communication.*] Neither can he be permitted to give parol evidence of a deed, or to prove a copy of one which has been intrusted to him by his client (c).

Admissions made by an attorney on the record, with a view to the trial of the action, as of the execution of a deed or agreement, are evidence against his client (d), but mere

(a) 2 Wils. 328. In the case of *Pitt v. Yalden*, 4 Burr. 2060, Mansfield, L. C. J. said, (alluding to the case of *Russel v. Palmer*), "L. C. J. Wilmot told me, that it came out upon the defendant's own evidence, and the verdict went upon that fact, that it was *lata culpa*, or *crassa negligentia* in Palmer the attorney; and that there appeared to be in reality no ground for the pretence of compromise which had been made part of Mr. Palmer's excuse and defence."

(b) 2 Wils. 328.

(c) Per Bayley, J. Leicest. Lent Ass. 1809. And see *Copeland v. Watts*, 1 Starkie's C. 95.

(d) *Young v. Wright*, 1 Camp. 141. *Goldie v. Shuttleworth*, 1 Camp. 70. *Milward v. Temple*, *ibid.* 375. *Vide tit. Admissions, supra*, p. 31, and Vol. I. p. 365, note (k). [*Alton v. Gilmanton*, 2 N. Hamp. Rep. 520.]

admissions in conversation are not admissible, for they are not warranted by a presumption that they were authorized by the client (*o*). So an admission proved to be in the hand-writing of the attorney on the record, consenting to a verdict for the plaintiff, will be sufficient evidence of the defendant's consent.

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ARTICLES OF WAR. See Vol. I. p. 165.

AUGMENTATION.

A CURACY may be proved to have been augmented by showing an order for the augmentation, entered in a book, and signed by the governors of Queen Anne's Bounty, according to the stat. 1 Geo. I. stat. 2, c. 10. s. 20, without proof that the money was laid out in land, and allotted by deed under the corporation seal of the governor, to be annexed to the curacy, and that * such deed was enrolled * 137 within six months after its execution, according to that statute and the stat. 9 Geo. II., c. 36 (*e*).

AUTHORITY.

As to the authority of an agent, see tit. AGENT.

Of a partner, see tit. PARTNER.

See also TRESPASS—REPLEVIN..

As to proof of authority to receive money, see tit. PAYMENT.

To give notice to quit, see EJECTMENT.

AUTREFOIS ACQUIT. *Vide supra*, Vol. I. p. 151.

AWARD.

It has been seen that an award regularly made under a submission by the parties, operates conclusively as a judgment of a court of competent jurisdiction (*f*).

(*o*) *Vide Parkins v. Hawkshaw*, 2 Starkie's C. 239. But where it is proved that he is the attorney of the other party, proof of a proposal made by him on behalf of his client is admissible. *Gainsford v. Grammar*, 2 Camp. 9.

(*e*) *Doe d. Graham v. Scott*, 11 East, 478.

(*f*) *Supra*, Pt. II. tit. *Judgments*, p. 212. *Doe v. Rosser*, 3 East, 15. *Herbert v. Cooke*, Willes, 86; *infra*, 139, n. (*p*). *Vide etiam Price v. Hollis*, 1 M. & S. 105. An award made upon a parol submission is evidence under a count on the original demand. *Kingston v. Phelps*, Peake's C. 227, or on an account stated. *Ib*.

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Proof of sub-
mission.

In an action upon an award it is necessary to prove the authority delegated by the parties to the arbitrator, and his making the award. The authority may be by parol. If it be by deed, it must be produced, and the execution (*g*) by all the parties to the reference proved.

Where four parties agreed to refer the co-partnership accounts, and all matters in difference between them, and any two of them, and the arbitrator awarded that a separate debt was due from *A.*, one of the partners, to *B.*, another partner, it was held, that in order to establish the existence of this debt it was necessary * to prove the execution by *A.* and *B.*, and also by the two other partners (*h*.)

Next the execution of the award itself must be proved, by means of the attesting witness, if it has been subscribed by one, or proof of his handwriting, and perhaps that of the arbitrator, if the witness be dead (*i*).

Where the submission is to *A.* and *B.*, and such third person as they shall appoint; in order to satisfy an allegation that *A.* and *B.* appointed *C.*, it is not sufficient to produce an award executed by the three, reciting that *A.* and *B.* did appoint *C.*, even although *C.* acted along with them in the arbitration (*k*).

Where an award has been made on a reference by rule of court, to prove the order (in the same court) it is sufficient to produce the office-copy of the rule, making the order a rule of court (*l*).

Where a parish had continued to repair a road within it, notwithstanding an award made by commissioners under an inclosure act, sixteen years ago, which awarded that the highway was in a different parish, it was held that upon an indictment against the first parish for not repairing the road, it was incumbent upon them to prove that the previous notices to the parishes to be affected by the award had been given as required by the act (*m*), for the repairs subsequent to the award raised a presumption that notice had not been given. But in the absence of such a presumption, a presumption arises in such a case that the commissioners have done their duty (*n*).

(*g*) See tit. *Deed*.

(*h*) *Antram v. Chace*, 15 East, 209.

(*i*) See *Private Writing*, proof of.—*Attesting Witness*.

(*k*) *Still v. Halford*, 4 Camp. 17.

(*l*) Ibid. But if the action is brought in another court, *semble*, the rule itself should be produced.

(*m*) *R. v. Haslingfield*, 2 M. & S. 558.

(*n*) According to the general rule. See *Ld. Ellenborough's ob-*

* An award, made under bonds of submission, that certain premises should be delivered up to the lessor of the plaintiff in ejectment, was held to be conclusive as to his right (*o*). And in general an award made under competent authority is binding and conclusive upon the parties (*p*). And it may be given in evidence under the general issue in assumpsit. (1)

But an award, although under a submission of all matters in difference, will not be conclusive upon any matter which was not at all contested before the arbitrator (*q*). And the arbitrator may be examined in order to prove that no evidence was given upon a particular subject (*r*).

BAIL.

THE bail of a party are incompetent, from interest, to give evidence for him (*s*), in both civil and criminal cases. Where the testimony of one or both the bail is necessary, the party, on application to the court, may substitute another in his place, and so render him competent (*t*).

BAIL-BOND.

THE plaintiff in an action on a bail-bond, whether he be
servations, 2 M. & S. 561; *Williams v. East India Company*, 3 East, 192; and tit. *Presumption*.

(*o*) *Doe v. Rosser*, 3 East, 15.

(*p*) See *Campbell v. Twenlow*, 1 Price, 81. 6 Ves. 282. 9 Ves. 364. 14 Ves. 271. 1 Swanst. 55.

(*q*) *Ravee v. Farmer*, 4 T. R. 146. *Marten v. Thornton*, 4 Esp. 180. [Ante, Vol. I. p. 200, note (2).]

(*r*) *Marten v. Thornton*, 4 Esp. 180, Cor. Ld. Alvanley.

(*s*) 1 T. R. 164. 2 Esp. C. 606. *Collett v. Jennis*, Rep. Temp. Hardw. 183.

(*t*) Tidd's Pr. 264. *Collett v. Jennis*, R. T. Hardw. 183. This is done by an application to the court, on affidavit, stating that the witness is a material, one upon the terms of adding and justifying another. One who has made a deposit under the Stat. in lieu of bail, is, it seems, incompetent. *Lacon v. Higgins*, 3 Starkie's C. 178. Note, That the money, by rule of court, remained in court to await the event of the suit. It is no objection that the witness was one of the bail below. *Piesly v. Von Esch*, 2 Esp. C. 604. But where an attachment against the sheriff has been set aside on a condition that it shall remain as a security, the bail cannot be examined. *Ib.* and see *Brown v. Neave*; Wightw. 406.

(1) [See *Homes v. Avery*, 12 Mass. Rep. 134.]

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the sheriff, or his assignee under the plea of * *non est factum*, need prove the execution only (*u*) in the ordinary way. If the defendant plead that the bond was taken for ease and favour, and the plaintiff reply that it was taken for the security of his prisoner, and issue be joined thereon, slight evidence will, it is said, maintain the replication (*x*). Upon a plea of *comperuit ad diem*, the appearance, being matter of record, is tried by the record (*y*).

Where the bond is taken by the sheriff after the return of the writ, it is void, since the condition is that the defendant in the original action shall appear at the return of the writ, which is impossible. The defendant may take advantage of the defence under the plea of *non est factum*, by producing the writ, or relying upon the statement of the writ and return on the record (*z*).

BANKRUPTCY.

Under this head will be considered, I. Proof of the title to sue as assignees of a bankrupt.—II. Proofs by assignees in particular actions.—III. Proof of voluntary preference. IV. To impeach payments by and to, and other transactions with, the bankrupt.—V. Of reputed ownership.—VI. Proofs in defence of actions by assignees.—VII. Proofs in actions by the * bankrupt.—VIII. Proof of the discharge of the bankrupt by the bankruptcy.—IX. Proofs on prosecutions against the bankrupt.—X. The competency of witnesses.

Title to sue as assignees.

I. *Of the title to sue as assignees.*—Assignees of a bankrupt who claim in their character of assignees, and not in their own right, must prove all the steps which are essential to constitute the party a *bankrupt*, and themselves his assignees. The fact that commissioners have already de-

(*u*) *Vide supra*, Vol. I. p. 327. But if the plaintiff should inadvertently have joined issue upon the plea of *nil debet* instead of having demurred, he will be bound to prove all the averments in the declaration, the issuing the writ, the arrest, the execution of the bond, and the assignment, if the action be brought by the assignee.

(*x*) 1 Sid. 383. See 1 Saund. 162. 1 Lev. 254. Com. Dig. Pleader, 2 W. 25. 2 Keb. 422.

(*y*) If the issue depend on the date of the appearance, the court of C. P. will order the *date* of the appearance to be entered on the filazer's book, although, before the application to the court, issue has been joined on the plea of *comperuit ad diem*. *Austin v. Fenton*, 1 Taunt. 23.

(*z*) 4 M. & S. 338. For other evidence on the plea of *non est factum*, see tit. *Deed—Non est factum*.

clared the party a bankrupt is not even *prima facie* evidence of the bankruptcy, for they act upon *ex parte* evidence, and have a mere authority without jurisdiction, and consequently their determination is not in the nature of a decree or judgment by a court of competent authority (a). But where the assignees declare upon a cause of action which accrued *after* the bankruptcy, without describing themselves as assignees, no evidence of title is necessary (b).

To establish their title to the bankrupt's property, they must prove, 1. The commission. 2. The trading. 3. The act of bankruptcy. 4. The petitioning creditor's debt. 5. The assignment.

First. The *commission* is proved by the mere production under the great seal, together with the petition to the chancellor (c). Commission.

The assignees of *A.* and *B.* may be described as the assignees of *A.* in an action to recover a debt due to his separate estate (d).

Secondly. That the party was a trader (e).

(a) *Ld. Raym.* 580. Assignees sue in a representative capacity and must show that those whom they represent would have been entitled to recover, *per Buller*, J. 3 T. R. 782. The assignees of *A.* and *B.* under separate commissions cannot in the same action recover a debt jointly due to *A.* and *B.* and also separate debts due to each. *Hancock v. Haywood*, 3 T. R. 433. But assignees under a joint commission against *A.* and *B.* and also under a separate commission against *C.* may recover a debt due to the three. *Streatfield v. Halliday*, 3 T. R. 779; see further, Part IV. 1491, 2. *Ray v. Davis*, 2 Moore, 3. 8 Taunt. 134. S. C.

Assignees describing themselves to be assignees under a commission against *A.* and *B.*, must prove the bankruptcy of both. *Hogg v. Bridges*, 2 Moore, 122. 8 Taunt. 200, S. C. *Semble*, the non-joinder of a co-assignee is a ground of nonsuit. *Snelgrove v. Hunt*, 2 Starkie's C. 424.

(b) *Evans v. Man*, Cowp. 569. [See *Thomas & al. v. Rideing & al.* Wightwick, 65.]

(c) P. N. P. 41.

(d) *Stonehouse v. De Silva*, 3 Camp. 399.

(e) The following persons are traders:—A banker, broker, factor, (5 Geo. II. c. 30, s. 39); butcher, (4 Burr. 2148); shoemaker, (Cro. Car. 31. Cro. Eliz. 268); one who rents a brick-ground, and makes bricks for public sale, (1 T. R. 34. *Sutton v. Wheeley*, 7 East, 442); innkeepers and publicans who sell liquors out of their houses generally (1 T. R. 572); a farmer who buys and sells for profit horses not used in the farming business, to the amount of five or six in two years (1 T. R. 573. n. 2 N. R. 78); a pawnbroker, *semble*, (per *Ld. Hardw.* 1 Atk. 206); stock-brokers buying and selling stock by commission; so, *semble*, bakers and tanners, (3 Mod. 330); a scrivener, (per *Ld. Hardw.* 1 Atk. 141); an attorney, who

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Trading.

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* The nature of the trading itself, which will subject the party to the operation of the bankrupt laws, is *matter of positive statutory definition (*f*) and of legal consideration; but it is a question of fact, whether the party has done such acts as constitute him a trader in point of law, and also when the acts are of a dubious nature, whether they have been done with an *intention* to carry on trade.

The intention to trade may be inferred from a single act of buying and selling.

The purchase of a single lot of timber, if made with intent to sell it again, will make a man a trader (*g*).

After proof that he has once traded, it is not necessary to prove continued acts of trading up to the very time of the bankruptcy; it is sufficient to prove acts from which

is a depositary of money to be laid out in securities at his own discretion, and receives a compensation distinct from his fees for drawing the conveyances, for an attorney is a scrivener (*Hutchinson v. Gascoigne*, Holt's N. P. R. 507); an executor carrying on trade for the benefit of the testator's children (3 Esp. 88. 10 Ves. 110); a person who purchases more cattle than are necessary for his own use with a view to a re-sale (*Newland v. Bell*, Holt's C. 221.)

The following, it has been held, are not within the scope of the bankrupt laws:—An attorney who receives and places out the monies of his clients in the usual course of business, and charges in respect of the deeds or securities, and not as commission, on the monies in his hands (*Hurd v. Brydges*, Holt, 654); a schoolmaster who buys books and shoes, and retails them to his pupils (*Valentine v. Vaughan*, Peake, 76); one who erects public baths on land granted to him for the purpose (*Williams v. Stevens*, 2 Camp. 300); who builds a theatre to be held in shares, for which he is to be paid according to measure and value, he being a shareholder (*ibid.*); who buys timber which he uses for building of houses, which he sells (*Clark v. Wisdom*, 5 Esp. 147); a clerk in a custom-house employed by merchants to receive money on debentures with which he discounts bills on his own account (2 Esp. 555); a person who occasionally buys and sells hay, corn and horses, with a view to profit, but without making them the means of seeking his living (*Stewart v. Ball*, 2 N. R. 78. *Bolton v. Sowerby*, 11 East, 274); receivers of taxes (5 Geo. II., c. 30, s. 40); graziers (*ibid.*); drovers (*ibid.*); farmers (*ibid.*); contractors for victualling the navy (1 Vent. 270); innkeepers (4 Burr. 2064); one who builds on his own land for any purpose (2 Camp. R. 200); one who draws bills for the purpose of improving his estate, and borrows accommodation bills, in lieu of which he gives his own (*Hankey v. Jones*, Cowp. 745); a builder who buys timber for building houses, and sells the houses (5 Esp. R. 147); holders of stock in different trading companies by various statutes (3 Esp. 88. 10 Ves. 110.)

(*f*) See the stat. 1 Jac. I. c. 15, s. 2, and 21 Jac. I. c. 19, s. 2.

(*g*) *Holroyd v. Gwynne*, 2 Taunt. 176. See also *Newland v. Bell*, Holt's C. 221. *Stewart v. Ball*, 2 N. R. 79.

- it can be inferred that he *intended* to continue the trade (h).
Thus the soliciting orders for business is evidence of the party's intention to continue the trade, although he has not actually transacted business for some time previous to the act of bankruptcy (i). Trading.

Where a fisherman has occasionally bought and sold fish, it is to be presumed, that whilst he remains a fisherman he carries on business in the same way (k).

And where business has been carried on by the party in partnership with another, which partnership had been dissolved some years before, and no act of trading had been done for two or three years before the time when the petitioning creditor's debt accrued, but the concerns had not been ultimately wound up, and part of the stock still remained in the warehouse * of the parties undisposed * 144 of, the jury found, under the direction of the court, that the trading continued (l).

Thirdly. The several acts which constitute bankruptcy are matter of positive statutory definition; and whether a particular act, when proved, falls within the definition, is a question of law; but whether the act itself has been committed, and particularly whether it has been done with that *intention*, which in the particular instance is essential to bankruptcy, is pure matter of fact for the consideration of the jury. Act of bankruptcy.

By the stat. 1 Jac. I. c. 15, s. 2, the several acts of bankruptcy there specified (m) must be done to the intent,

(h) 5 Esp. R. 235. It is a question for the Jury whether there has been an entire cessation of trading, or merely an interruption with intent to resume it should an opportunity offer. *per* Ld. Eldon, *Ex parte Patterson*, 1 Rose, 402; *Henry v. Birch*, 1 Rose, 356.

Although the trader be described as a money-scrivener, and the general words, dealer and chapman, be omitted, *semble*, it is sufficient to prove any species of trading *Smith v. Sandilands*, Gloster Summ. Ass. 1819, 1 Gow; and *per* Wood, B. Winch. Sp. Ass. 1820. Mann. Ind. 371. *Hale v. Small*, 2 B. & B. 25.

(i) *Wharam v. Routledge*, 5 Esp. C. 235.

(k) *Heanny v. Birch*, 3 Camp. 233.

(l) *The Executors of Backhouse v. Tarleton*, Cor. Ld. Ellenborough, Guildhall, on an issue from the Ld. Chancellor to try the fact.

(m) These are nine in number; viz. 1, to depart the realm; 2, begin to keep house; 3, or otherwise absent himself; 4, or suffer himself willingly to be arrested for any debt, or other thing not grown or due, for money delivered, wares sold, or any other just or lawful cause, or good consideration or purposes; 5, or suffer himself to be outlawed; 6, or yield himself to prison; 7, or willingly or fraudulently procure himself to be arrested, or his goods, &c. to be attached or sequestered; 8, or depart from his dwelling-house; 9, or

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or whereby the creditors may be defeated or delayed for the recovery of their just and true debts. Under these words it is sufficient to prove an intention to defeat or delay creditors, without proof of any actual delay of a creditor (*n*).

Intention.

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In some cases it seems to have been held, that the * departing the realm, (and the principle extends to the other acts of bankruptcy specified in the statute,) would constitute an act of bankruptcy; provided it was proved that a creditor was in consequence delayed, independently of any proof of an *intention* on the part of the bankrupt to do so, that is. the latter branch of the clause was considered to be entirely independent of the intent mentioned in the former part; the effect was to render the mere delaying of the creditor, provided it was the consequence of one of the acts specified, an act of bankruptcy. As in *Woodier's* case, who departed the realm because he had killed his wife (*s*); and in that of *Raikes v. Pereau* (*o*), where the primary reason for the bankrupt's going abroad was, that a young woman had refused to live with him as his mistress, unless he took her abroad. In both these cases creditors were delayed, and for that reason the question of intention was considered to be immaterial.

In the subsequent case of *Robertson v. Liddell* (*p*), this clause of the statute was much discussed, and it was held that the words were to be read, "to the intent his creditors *shall*, or *that thereby* they may be defeated;" making the intent to govern the whole clause. Still those cases might probably have been decided as they were, consistently with this construction, since, although the primary object of the bankrupt in going abroad might not be to delay his creditors, yet if the delaying his creditors was

make or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, &c. See 21 Jac. I. c. 19, s. 28. 5 Geo. II. c. 30, s. 24.

(*n*) *Robertson v. Liddell*, 9 East, 487, in which the case of *Fowler v. Padgett*, 7 T. R. 509, was overruled, where it had been held that the word *or* in the statute meant *and*. See *Hammond v. Hicks*, 5 Esp. 139. 1 Taunt. 273. 479. 3 Smith, 347. *Wilson v. Norman*, 1 Esp. 334. *Holroyd v. Gwynne*, 2 Taunt. 176. *Ramsbottom v. Lewis*, 1 Camp. 279. *Holroyd v. Whitehead*, 3 Camp. 530, *infra*, 152, n. (*c*). [14 Ves. 80.]

(*s*) B. N. P. 39.

(*o*) Co. B. L. 5th edit. 73; and see *Vernon v. Hankey*, Co. B. L. where Buller, J. approved of the decision in *Woodier's* case, and said that it had always been considered and acted upon as good law.

(*p*) 9 East, 487. *Holroyd v. Gwynne*, 2 Taunt. 176.

the immediate and necessary consequence of his act, it might be considered as *evidence* of such an intention (*q*).

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* In order to prove the intention of the bankrupt to delay a creditor, declarations made by him which were contemporary with the act itself, are admissible. Accordingly, what the party said on requesting his servant or clerk to deny him to creditors (*s*), or when he departed from his dwelling-house, or even upon his return home again, is evidence to show with what intention he secluded or withdrew himself from his creditors (*t*).

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The bankrupt was arrested and taken twelve miles from home on the 5th, was discharged at one o'clock in the afternoon of the 6th, and returned home at ten o'clock on the night of the 7th; it was held, that what he said to a witness (who inquired where he had been), as to the reason of his absence, was admissible, in explanation of his act (*u*). So what the bankrupt said on removing his books, is evidence (*x*). But declarations or admissions by the bankrupt, which are subsequent to the act, are not admissible (*y*).

Where the proceedings are read in evidence under the statute, a deposition, stating that the bankrupt had absented himself and that he had admitted that he had absented himself for the purpose of avoiding his creditors, but not specifying the time of such admission, is not even *prima facie* evidence to prove the act of bankruptcy (*z*).

The act to be proved, is the departing of the realm with *intent* to delay creditors, and the *intention* of the party is a question of fact for the determination of the jury, to be collected either from the contemporary * declarations of the trader, or to be presumed from circumstances, considering the mode and reason of the departure, the state of his affairs at the time, and other circumstances likely to operate as motives. The case is subject to the general presumption of law, that a man contem-

Departing the
realm.

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(*q*) See the observations of Lawrence, J. in *Fowler v. Padgett*, 7 T. R. 516.

(*s*) *Jamieson v. Eamer*, 1 Esp. C. 381.

(*t*) *Bateman v. Bailey*, 5 T. R. 512; B. N. P. 41. *Ambrose v. Clendon*, Rep. Temp. Hardw. 267; 4 Esp. 233. *Wilson v. Norman*, 1 Esp. 334. *Robertson v. Liddell*, 9 East, 487. *Holroyd v. Gwynne*, 2 Taunt. 176.

(*u*) *Bateman v. Bailey*, 5 T. R. 512.

(*x*) *Ambrose v. Clendon*, Rep. Temp. Hardw. 267.

(*y*) *Robson v. Kemp*, 4 Esp. C. 233.

(*z*) *Marsh v. Meager*, 1 Starkie's C. 353.

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plates that result which is the natural and obvious consequence of this act, although he may have another primary and immediate object in view (z).

If the delay of creditors be the necessary consequence of the departure, the intention to delay may be inferred, although the party had another and more immediate object in departing, as on account of domestic dissensions (a), to avoid a prosecution for felony (b), or in order to live with a mistress (c); and so in other cases where the purpose of departure is *aliene* from that of trade, for the party must be supposed to contemplate and intend that which is the immediate and necessary consequence of his act (d).

- * 148 But it is not enough to show that the party left * England and proceeded to Ireland, where he also carried on trade, without leaving funds behind him for the payment of his debts, for *non constat* that he did not go for the very purpose of providing funds; and this case differs essentially from that of *Holroyd v. Whitehead*, since there the intention of the departure was *aliene* from that of trade (e).

If a subject, domiciled in Ireland, leave his family there, and come to England to settle his affairs, and return to Ireland abruptly to avoid an arrest, he commits an act of bankruptcy (f).

(z) *Vide supra*, 145. A letter written by the trader during his absence is evidence to explain its nature. *Windham v. Paterson*, 1 Starkie's C. 146; 2 Christian's B. L. 448.

(a) *Holroyd v. Whitehead*, 3 Camp. 530.

(b) *Woodier's case*, B. N. P. 39.

(c) *Raikes v. Pereau*, Co. B. L. 73.

(d) See Mr. J. Lawrence's observations in *Fowler v. Padgett*, 7 T. R. 516. In the case of *Holroyd v. Whitehead*, (3 Camp. 530, subsequently approved of by Ld. Ellenborough, *Windham v. Paterson*, 4 Camp. 286. S. C. 1 Starkie's C. 146,) the bankrupt left his dwelling-house on account of domestic dissensions with his wife, and left a letter stating that there would be 20s. in the pound for creditors, but that, be it less or more, he had done with trade, desiring that no one should be allowed to take goods out of the warehouse in preference, and giving no directions for the continuance of his business; during his absence a creditor called for money, who went away unsatisfied. And it was left to the jury, whether, under the circumstances, the party had not left his house with an intention to delay his creditors, and whether a creditor had not been delayed; and the jury found both these facts. See also *Ramsbottom v. Lewis*, 1 Camp. 279.

(e) *Windham v. Paterson*, 1 Starkie's C. 144. See *Warner v. Barber*, Holt's C. 175.

(f) *Williams v. Nunn*, 1 Camp. 152, Cor. Chambre, J. 1 Taunt. 270; where it is stated, that the family resided in England, and the court adverted to that circumstance.

Beginning to keep house.—This act of bankruptcy must be evidenced by some act by which the party secludes himself from the solicitation of his creditors, with the intention of doing so. The most usual proof consists of an actual denial to a creditor, by a clerk or servant authorized to do so by the trader who is in the house. But although this is the usual medium of proof, it is not the only one; for if a trader seclude himself in a private part of the house, in order to avoid his creditors, who are by this means deprived of access to him, he begins to keep house, and commits an act of bankruptcy (*g*). As where a trader removes from a part of the house where his creditors usually have free access to him to a more retired part of it, by means of which his creditors are prevented from importuning him (*h*).

Beginning to
keep house.

Where the evidence of the act of bankruptcy consists in the denial to a creditor by order of the trader, *an actual * 149 denial must be proved (*i*) to one who is a creditor (*k*); and it would not be sufficient to prove a denial to an agent of the creditor (*l*), without proof that the trader knew him to be such agent; so he must have a present demand against the trader; a mere claim on a security not due is insufficient (*m*). It must be proved that the trader gave orders to be denied to the creditor; but if he give a general order to be denied to all, and is denied to a creditor, it is suf-

Denial.
* 149

(*g*) 1 Camp. 271. Com. Dig. Bankrupt, c. 1. *Dickinson v. Foord*, Barnes, 160. An order to be denied to creditors is but evidence of an intention to delay. *Lazarus v. Waithman*, 5 Moore, 513. A general order to deny with that intent, or a general order to admit no one whom the servants did not know, for fear of a second arrest. *Harvey v. Ramsbottom*, 1 B. & C. 55. Or a general order to deny, and a beginning to keep house is sufficient. *Lloyd v. Heathcote*, 2 B. & B. 588. Note, in the latter case, there was a denial to the collector of church and highway-rates. See *Gillingham v. Laing*, 6 Taunt. 532.

(*h*) *Dudley v. Vaughan*, 1 Camp. 271. See also *Chenoweth v. Hay*, 1 M. & S. 677; 1 Taunt. 270, 479.

(*i*) *Garrett v. Moule*, 5 T. R. 575. *Hawker v. Saunders*, Co. B. L. 79. *Dudley v. Vaughan*, 1 Camp. 271.

(*k*) Per Lee, C. J. B. N. P. 40. A denial to a tax-gatherer is sufficient. *Jeffs v. Smith*, 2 Taunt. 401.

(*l*) B. N. P. 39, 40. 1 Montague, 87. Green, 39. *Barrow v. Foster*, ib. 44. A denial to the clerk of a holder of a bill is sufficient, 2 T. R. 59.

(*m*) 7 Vin. Abr. 61, pl. 14, *ex parte Levi*; but a denial to the holder of a bill on the morning of the day when it becomes due is sufficient. *Colkett v. Freeman*, 2 T. R. 59.

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keep house.—
Intention.
* 150

ficient, although he wished to avoid a different creditor (n). Proof that the trader was in distressed circumstances, and that he was by his own order denied to several persons, some of whom called more than once, is evidence to go to a jury of a denial to a creditor (o) (1).

* The presumption of an intention to delay a creditor, arising from denial, may be rebutted by any evidence

(n) *Mucklow v. May*, 1 Taunt. 479.

(o) *Jamieson v. Eamer*, 1 Esp. C. 381. But in the case of *Garrett Moule*, 5 T. R. 575, the trader, being in expectation that several bills would be presented to him for payment, was advised by his friends to keep out of the way of his creditors, and he accordingly gave orders to his clerk to be denied to every person; he retired up stairs with his account books, where he remained several days, and was denied to several persons, but it did not appear that they were creditors. A creditor on two bills of exchange to the amount of 100*l.* called, but did not ask for the bankrupt, understanding that he was from home. The court of K. B. held, that these circumstances did not constitute an act of bankruptcy; and *Ld. Kenyon* observed, that the question on trials of that kind had always been asked, whether or not the debtor was denied to the creditor, which showed in what light the statute had been considered. (See also *Hawkes v. Saunders*, Co. B. L. 79. B. N. P. 40.) Notwithstanding this authority, it is probable that such a case would now meet with a different decision. The act of bankruptcy consists in a beginning to keep house with intent to delay creditors, and if the act be done with that intent, then, according to the principle established in *Robertson v. Liddell*, (9 East, 487,) it is not material whether the intention was carried into effect by an actual delay of any creditor. A denial is the mere medium of proof. A trader may have no servant or agent to deny him; and then this medium of proof becomes inapplicable. The fact of intention is perfectly independent of any actual delay. The beginning to keep house must no doubt be manifested by some overt act of seclusion on the part of the trader, and although he does not at all remove from the room or part of the house which he usually occupies, a denial to a creditor, through a servant, is as much an act of seclusion as if he had barred or nailed up the door; and a denial in such case seems to be almost the only act by which the beginning to keep house can be manifested; but where the trader actually removes from a more public part of his house which he usually occupies, to a more private one, and there secludes himself with the intention to delay his creditors, the act of bankruptcy seems to be as complete without proof of actual delay as in the case of a departure from the dwelling-house or realm with that intent; and it was so held in the case of *Dickenson v. Foord*, Barnes, 160. And see *Bayly v. Schofield*, 1 M. & S. 338. *Bignold v. Waterhouse*, Ibid. 255. *Dudley v. Vaughan*, 1 Camp. 271.

(1) [A denial to a sheriff was not an act of bankruptcy, under the law of the U. States (1800) unless he went to serve the debtor with process. And although a debtor concealed himself from his creditors, or was denied to them, yet if it did not thereby prevent the service of process, it was not an act of bankruptcy. *Barnes v. Billington*, Circuit Court, April 1803. Wharton's Digest, 75, 76.]

which proves the denial to have proceeded from a different motive. As by evidence that the trader was sick at the time, or engaged in company, or that it was at a house where he does not transact business, and that he referred the creditor to his shop (*p*). So a refusal to see a creditor, because it was the trader's dinner hour, is not an act of bankruptcy (*q*). As the bankruptcy consists in the act of seclusion by the trader, with intent to delay his creditors, the intention with which the creditor calls is immaterial (*r*).

* A denial, with a view to delay a creditor at the time, * 151 is not purged by the subsequent admission of the creditor (*s*). What the party said on requesting to be denied, or when he in any other manner secluded himself, is admissible evidence to show what his intention was.

Otherwise absenting himself.—It is sufficient to prove an Absenting himself. absenting of himself by the trader from his usual place of business; as from a counting-house, where he has a dwelling-house in the country, with intent to delay his creditors (*t*); and in general, any absence from his dwelling-house, for however short a period, is sufficient. As where a trader, on being called upon by several creditors for money, leaves his house under pretence of getting money for them, and spends the evening at a billiard-table, or at a tavern (*u*). So where a trader apprehending an arrest concealed himself in a back room in another person's house, until a sheriff's officer, who he was informed was going towards his house, had left the street (*x*), and then returned home (1).

(*p*) Per Lord Mansfield, *Round v. Hope*, Co. B. L. 94, 5th edit. *Field v. Bellamy*, stat. 15 Geo. II. B. N. P. 39.

(*q*) *Smith v. Currie*, 3 Camp. 349; B. N. P. 39. And see *Shew v. Thompson*, Holt's C. 159, where the direction was to deny the trader to any one who called whilst he was at dinner or engaged in business.

(*r*) *Ex parte White*, 3 V. & B. 129.

(*s*) *Wood v. Thwaites*, 3 Esp. 245. *Hopkins v. Ellis*, 1 Salk. 110. *Calkett v. Freeman*, 2 T. R. 59.

(*t*) *Judine v. Da Cossen*, 1 N. R. 234, where the trader quitted his counting-house in town, taking his books with him, without the *animus revertendi*, and went to his dwelling-house in the country, where he slept a few nights, and then finally quitted it.

(*u*) *Bigg v. Spooner*, 2 Esp. C. 651.

(*x*) *Vincent v. Prater*, 4 Taunt. 603. *Chenoweth v. Hay*, 1 M. & S. 676. See also *Bayly v. Schofield*, 1 M. & S. 338.

(1) [Whether a flight of a resident of another state to his home amounted to an act of bankruptcy—*dubatur* in *Pleasants v. Meng & al.* 1 Dallas, 390.]

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So the riding out of town in order to avoid a writ, and get the term of the plaintiff (*y*), is an act of bankruptcy.

* 152 Where one of three bankers resided at the place where the business was carried on, the other two * living at a distance, shut up the house and stopped payment, it was held that this was not evidence of a joint bankruptcy by the three (*o*).

It is not essential to prove that any creditor was actually delayed (*z*).

The question of intention in this as in all other cases is for the jury; and if evidence be offered in explanation of the absence, and in order to rebut the presumption to delay creditors, as that he did it to avoid irritation and harsh language; the case is for their consideration (*a*).

Yield himself
to prison.

If a person upon being arrested choose rather to go to prison than pay the debt, although he has money sufficient, declaring that he does it in order to force his creditors to come to a composition, this is evidence of an act of bankruptcy, under the clause, *or yield himself to prison* (*b*) (1).

Departure
from the dwelling-house.

To prove an act of bankruptcy by a *departure* from the dwelling-house, the act of departing must be proved; and secondly, the intent to delay creditors, &c. (*c*); and on the other hand, any facts are admissible which tend to disprove the intention, and to show that the trader departed without any intention to delay his creditors (*d*).

* 153 * A trader who has no settled house or counting-house,

(*y*) *Maylin v. Eyloe*, 2 Stra. 809. *Qu.* whether if a trader leave the realm without any intention to delay his creditors, but whilst absent he deliberately forms that intention, and announces it, he commits an act of bankruptcy. See *Windham v. Paterson*, 1 Starkie's C. 144; and 1 Christian's B. L. 178.

(*o*) *Mills v. Bennett*, 2 M. & S. 556,

(*z*) *Hammond v. Hickes*, 5 Esp. 139. *Robertson v. Liddell*, 9 East, 487.

(*a*) *Vincent v. Präter*, 4 Taunt. 603.

(*b*) *Ex parte Barton*, 7 Vin. Abr. tit. Creditor and Bankrupt, 61, 62, pl. 15.

(*c*) See the cases above cited, p. 145, 6, 7; also *Aldridge v. Ireland*, cited 1 Taunt. 273; *Helroyd v. Whitehead*, 3 Camp. 530; *Williams v. Nunn*, 1 Taunt. 273. Since the words of the statute are, "Whereby the creditors may be defeated or delayed for the recovery of their just and true *debts*," it has been held, that an absconding to avoid an attachment for the non-delivery of goods pursuant to an award, being a mere *duty* and not a debt, was not within the statute. *Lingwood v. Eade*, 1 Atk. 196.

(*d*) See Lord Mansfield's observations in *Worseley v. Demattos*, 1 Burr. 467.

(1) [See *Clarke v. Ray*, 1 Har. & J. 326. *Nelms v. Pugh*, 1 Murphrey, 149. *Rathbone v. Blackford*, 1 Caine's Rep. 588.]

but takes up his residence at a public-house in the place to which his business carries him, may commit an act of bankruptcy by a departure from that house (e).

A trader on absenting himself stated that writs were out against him; it was held to be unnecessary to prove that fact (f), for the intention is the same, whether the assertion was true or false.

In order to establish an act of bankruptcy, by proof of a fraudulent conveyance on the part of the trader, it is essential, 1st. to prove the conveyance, 2dly, to show that it was fraudulent; or, in other words, according to the stat. 1 Jac. I. c. 15, that it was made with intent to defeat or delay creditors.

Fraudulent
conveyance.

1st. It seems that a conveyance by *deed* must be proved (g) (1) in the regular way by means of the subscribing witnesses. But as against a defendant, in an action for the value of goods attempted to be conveyed, his admission of the execution of the deed on his examination before the commissioners supersedes the necessity of proving the deed in the usual way by the subscribing witness (h). The deed must be properly stamped (i). The conveyance will enure as an act of bankruptcy, although it is void through fraud, as where an insolvent trader conveys to an infant son (k). It is not necessary that the deed should convey, or profess to convey the *whole* of the trader's property, it * is suffi- * 154

Proof of the
conveyance.

(e) *Holroyd v. Gwynne*, 2 Taunt. 176.

(f) *Wilson v. Norman*, 1 Esp. C. 334. And see *Robertson v. Liddell*, 9 East, 487; *Holroyd v. Gwynne*, 2 Taunt. 176.

(g) See *Rust v. Cooper*, Cowp. 635, per Ld. Mansfield, C. J.; and Aston, J. in *Martin v. Peotress*, 4 Burr. 2478; 1 Esp. C. 68. Where A. and B. are partners, a fraudulent assignment by A. to B. is not an act of bankruptcy by B. For proof of the deed, see tit. *Deed*.

(h) *Boules v. Langworthy*, 5 T. R. 366. *Vid.* Vol. I. p. 363, 4. A conveyance of all the trader's property is fraudulent in law, without the aid of extrinsic proof. *Newton v. Chantler*, 7 East, 145. For every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. A conveyance of *part* is evidence to be left to a Jury whether it is not fraudulent, as giving a preference to particular creditors to the prejudice of others. *Pulling v. Tucker*, 4 B. & A. 382. It is not essential that it should have been made in contemplation of bankruptcy. *Ib.*

(i) *Whitwell v. Dimsdale*, Peake's C. 168.

(k) *Whitwell v. Thompson*, 1 Esp. C. 68.

(1) [The term "conveyance," in the United States bankrupt act, meant an instrument under seal—Therefore a fraudulent sale or transfer of personal property did not amount to an act of bankruptcy, unless effected by a writing under seal. *Livermore v. Bagley*, 3 Mass. Rep. 487.]

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Proof that the conveyance was fraudulent.

cient if he assign part of his effects (*l*) to part only of his creditors, to the exclusion or without the concurrence of the rest (*m*).

2dly. That the conveyance was *fraudulent*; and it is in point of law (*n*) deemed to be fraudulent, 1st. whenever its effect would be to prevent a fair distribution of the trader's property amongst his creditors, according to the spirit of the bankrupt laws (*o*); or, *secondly*, where the trader remains in possession of the property after the execution of the deed, by which he may obtain a false credit (*p*). The evidence to prove the first of these cases is to be derived partly from the deed itself, and frequently from extrinsic circumstances, the situation of the trader and his affairs, and of the assignees and their conduct, at the time of the conveyance; as if the conveyance be of *all* the trader's property to *one* creditor (*q*) for an unliquidated sum, or to a child without consideration, or with an exception merely colourable (*r*). (1)

* 155 Extrinsic circumstances which indicate fraud, are, that the affairs of the trader were embarrassed, or that * he was insolvent at the time, that he knew that he was so (*s*), and contemplated bankruptcy (*t*); that he intended to give an

(*l*) *Ex parte Foord*, cited 1 Burr. 477; B. N. P. 40. *Worseley v. Demattos*, 1 Burr. 478. *Devon v. Watts*, Dougl. 85. *Linton v. Bartlett*, 3 Wils. 47. *Morgan v. Horseman*, 3 Taunt. 243. But see *Hooper v. Smith*, 1 Blk. 442. *Cock v. Goodfellow*, 10 Mod. 489. 2 Eq. Ca. Ab. 100. S. C. *Small v. Oudley*, 2 P. Wms. 427.

(*m*) *Eckhardt v. Wilson*, 8 T. R. 140. But a conveyance for the benefit of the creditors, if they all assent, is not an act of bankruptcy. *Vid. infra*, n. (*s*).

(*n*) See Ld. Eldon's observations in *Dutton v. Morrison*, 17 Ves. 199.

(*o*) Per Le Blanc, J. in *Newton v. Chantler*, 7 East, 145. *Linton v. Bartlett*, 3 Wils. 47; *Wilson v. Day*, 2 Burr. 827, *Compton v. Bedford*, 1 Bl. R. 362. 1 Burr. 484.

(*p*) Per Ld. Kenyon, in *Manton v. Moore*, 7 T. R. 71. A conveyance of goods without deed is fraudulent, unless possession be given; if it be by deed, it is fraudulent, and an act of bankruptcy. See also *Worseley v. Demattos*, 1 Burr. 467.

(*q*) See *Wilson v. Day*, 2 Burr. 827.

(*r*) *Rust v. Cooper*, Cowp. 629.

(*s*) *Newton v. Chantler*, 7 East, 138.

(*t*) *Devon v. Watts*, Dougl. 85.

(1) [Whether a deed made without any valuable consideration to a child, is an act of bankruptcy—*dubatur* in *Joy's Lessee v. Cosart*, 1 Yeates, 50. 2 Dallas, 126.]

undue preference to a particular creditor (*s*), and showed this by his conduct and cotemporary declarations, or other acts; that he executed the deed at an unseasonable hour of the night (*t*); that the property conveyed constituted a considerable portion of his *whole* estate; that the consideration was merely colourable. All these are strong indications of fraud; and whenever it is once established, either by direct or circumstantial evidence, that the effect of the conveyance would be to deprive any creditors of the benefit of the bankrupt laws, the conveyance is, in point of law, deemed to be fraudulent, and the making it an act of bankruptcy. It seems to be sufficient to show that this would be the *effect* of the conveyance; it is therefore no answer to show, on the other side, that as between the parties themselves the transaction was fair and honourable (*u*), and for a good and valuable consideration; or that it was the result of importunity (*x*), or even of compulsion (*y*) on the part of the creditor, if the necessary consequence would be to * give an undue preference to one or more creditors, * 156 to the prejudice and exclusion of the rest (*z*).

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Proof that the conveyance was fraudulent.

Secondly, it is matter of extrinsic proof, that after the execution of the deed the goods remained in the possession

(*s*) See *Morgan v. Horseman*, 3 Taunt. 241. Where a trader resident in India, and drawing bills on England, made an assignment of all his effects for the benefit of his creditors, in certain proportions, which was assented to by the generality of his creditors, it was held that it was not an act of bankruptcy. *Inglis v. Grant*, 5 T. R. 530.

(*t*) *Compton v. Bedford*, 1 Bl. R. 362.

(*u*) See Montague's B. L. 66.

(*x*) A trader, urged by the importunity of a creditor, executed a conveyance of lands in trust to sell and pay the debt, and then in trust for certain relations, in order to give them an undue preference in contemplation of bankruptcy; held to be an act of bankruptcy. *Butcher v. Easto*, Doug. 294.

(*y*) As where a trader, conscious of his insolvency, and under arrest in execution, executed to the creditor a bill of sale of *all* his goods to pay the debt, and pay over the surplus to himself. *Newton v. Chantler*, 7 East, 135.

(*z*) *Worseley v. Demattos*, 1 Burr. 467. Where *A.* a trader, conveyed *all* his effects as a security to *B.*, who had agreed to become *A.*'s banker, and to honour his drafts, subject to a defeasance on *A.*'s paying such sum as *B.* advanced, with a covenant, that on failure in the performance on *A.*'s part, *B.* should take possession of the effects, the conveyance, although for a good and valuable consideration, was held to be fraudulent, 1st, because *A.* remained in possession after the execution of the deed, and thereby obtained a false credit; and, 2dly, because an undue preference had been given to *B.*

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of the trader, which has been deemed to be evidence of fraud, because the trader thereby obtains false credit to the deception or prejudice of his creditors (*a*). But this fact is not *conclusive* evidence of fraud, it may be explained by circumstances (*b*); accordingly, it is sufficient to show, that such possession was given as the nature of the case will admit of.

The engineer of a canal company borrowed money from the company, in order to pay his creditors, and executed a bill of sale of timber, and other articles of his property, deposited on the premises of the company, (which he had bought with money advanced by them,) and delivered them to the company by the delivery of a copper halfpenny; and the court held that since such possession had been delivered to the company at the time of executing the deed, as the case admitted of, the deed was not fraudulent (*c*).

* 157
Proof of privy to a fraudulent deed.

* In general, one privy to a fraudulent deed, cannot set it up as an act of bankruptcy (*d*); and it would be a fatal objection to show that the petitioning creditor was a party, or privy to the fraudulent deed; but if he was not privy, it is no objection that the co-plaintiffs being co-assignees with him, were privy (*e*); and it is no objection that the petitioning creditor was party to a deed of trust, by which the bankrupt assigned certain property for the benefit of his creditors, in consideration of which they released their debts, it having been afterwards discovered by the petitioning creditor, that the bankrupt had previously committed a secret act of bankruptcy (*f*).

Other acts of bankruptcy are specified in the stat. 21 Jac. I, c. 19, s. 2, where proof of intention is unnecessary; two of these, viz. the obtaining protections, and exhibiting bills against creditors to compel them to accept less than their just debts, seem to be now obsolete.

(*a*) *Manton v. Moore*, 7 T. R. 71. *Worsley v. Demattos*, 1 Burr. 467. A trader being in distressed circumstances, assigns *all* his estate to a creditor as a security for an unliquidated sum, without delivering any kind of possession, except by giving a letter of attorney to his own clerk to collect debts. The assignment was held to be fraudulent, on the ground of undue preference, and because there had been no alteration of possession. *Wilson v. Day*, 2 Burr. 827.

(*b*) Per Ld. Mansfield, 1 Burr. 484.

(*c*) *Manton v. Moore*, 7 T. R. 67.

(*d*) *Jackson v. Irwin*, 2 Camp. 49. *Bamford v. Baron*, 2 T. R. 594. n. *Tappenden v. Burgess*, 4 East, 230.

(*e*) *Tappenden v. Burgess*, 4 East, 230. *Dutton v. Morrison*, 14 Ves. 193.

(*f*) *Doe v. Anderson*, 1 Starkie's C. 262.

A third is as follows, "or being arrested for debt, shall after his arrest lie in prison two months, or more, upon that or any other arrest or detention in prison for debt, shall be adjudged a bankrupt from the time of the first arrest."

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Lying in
prison.

To establish an act of bankruptcy under this clause, it must be shown that the trader lay in prison two months before the issuing the commission, a subsequent lying in prison will not give effect to a previous commission (*g*). And the lying in prison must be for debt (*j*).

* A commission issued fifty-six days *inclusively* after the arrest is good (*h*). * 158

A trader being arrested on the 4th, was at large till the 8th, when he returned into custody; on the 10th, was removed by *habeas corpus* into the king's bench, where he remained more than two months, and it was held, that the act of bankruptcy related to the 8th (*i*), since there must be a *continuous imprisonment* of two *lunar* months.

Proof of lying
in prison.

A trader being arrested puts in bail, and afterward surrenders in discharge of his bail; the imprisonment is to be computed from the surrender, and not from the arrest (*k*). But where a trader was sick at the time of the arrest, and could not be removed, the imprisonment was reckoned from the arrest (*l*); and so it was where mere formal bail were put in before a judge, to get the trader turned over to the prison of the court, upon which he was surrendered, and sent there, since there was an entire continuous imprisonment from the time of the arrest (*m*). Another act of bankruptcy by the same section, is as follows, "or being arrested for the sum of 100*l.* or more of *just debt* shall after such arrest escape out of prison."

Escape.

A prisoner having been arrested in Kent, and brought up by *habeas corpus* to be bailed, was permitted by the sheriff to call at a house in London, and it was held, that

(*g*) *Glassington v. Rowlin*, 3 East, 407; 4 Esp. 224. S. C. *Gordon v. Wilkinson*, 8 T. R. 507. But see 2 Show. 512; 14 Ves. 80, 83. *Wydown's case*, Ibid.

(*j*) *Ex parte Bowes*, 14 Ves. 168. See 7 Price, 616.

(*h*) 3 East, 407. See Com. Dig. tit. Temps. *Lacon v. Hooper*, 6 T. R. 224.

(*i*) *Barnard v. Palmer*, 1 Camp. 509.

(*k*) *Tribe v. Webber*, Willes, 464.

(*l*) *Stevens v. Jackson*, 4 Camp. 164. [6 Taunt. 106. 1 Marsh. 469.]

(*m*) *Rose v. Green*, 1 Burr. 437.

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the passing through another county by the permission of the sheriff did not amount to an act of bankruptcy (*n*).

* 159 The arrest or detention for debt in these cases should be proved by an examined copy of the writ (if returned), and return of *cepi corpus*, the warrant, and arrest, or by *the *habeas corpus* and commitment (*o*), and the fact of lying in prison two months, may be proved either by any person acquainted with the fact, or by the books of the prison.

The act of bankruptcy has relation to the time of the arrest or going to prison (*p*), and the property vests in the assignees from that time. The assignees may rely on *any* act of bankruptcy previous to the issuing of the commission, and are not limited to that on which the commission was founded (*q*).

Petitioning
creditor's debt.

Fourthly. It is necessary to prove that the petitioning creditor's debt existed at the time of the act of bankruptcy (*r*), and also that it existed whilst the party was a trader (*s*); but it is no objection that the debt has since merged in a security of a higher nature (*t*). Where a bankrupt contracts a further debt, after he leaves off trade, and pays money without directing the application, the payment will be set against the old debt, and consequently if it reduce the old debt to less than 100*l.* it will not support a commission (*u*). If the credit given to the trader be unex-

(*n*) *Rose v. Green*, Burr. 437.

(*o*) *Salte v. Thomas*, 3 B. & P. 188. The prison-books are not evidence of the cause of commitment.

(*p*) *King v. Leith*, 2 T. R. 141.

(*q*) *Reed v. James*, 1 Starkie's C. 134. • *Hopper v. Richmond*, ib. 507.

(*r*) *Moss v. Smith*, 1 Camp. 489; 46 Geo. 3, c. 135; 14 Ves. 80—3. And where the proceedings under the commission merely showed that the debt existed at the date of the commission, and not that it existed at the time of the act of bankruptcy, it was held to be insufficient (*Clarke v. Askew*, 1 Starkie's C. 458; 14 East, 197; *infra*, 203.) As to the effect of an act of bankruptcy prior to the petitioning creditor's debt, *vid. infra*, 193.

(*s*) *Dawe v. Holdsworth*, Peake, 664. *Meggott v. Mills*, 12 Mod. 159; 1 Ld. Raym. 286; 1 Montague's B. L. 33. *Butcher v. Easto*, Dougl. 296.

(*t*) *Ambrose v. Clendon*, Ca. T. Hardw. 267; 2 Str. 1042. S. C. Or that the creditor has obtained judgment for it. *Bryant v. Withers*, 2 M. & S. 123.

(*u*) *Meggott v. Mills*, Ld. Raym. 286; Comb. 463. A commission on the petition of *four* creditors is good, although it does not appear on the face of the affidavit that the debts amounted to 200*l.*; proof being given at the trial that they amounted to that sum. *Hill v. Heale*, 2 N. R. 196.

A debt on a solicitor's bill will support the commission, notwith-

pired at the time of the act of bankruptcy, the debt will not support * a commission (*o*), unless a written security be given for the payment (*x*); so a vendor of goods to be paid for by bill at four months cannot sue out a commission till the bill has been given, or till the four months have expired (*y*). But it seems, that if goods be sold to be paid for a present bill, the Jury may presume, from circumstances, that such a bill has been given (*z*).

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Proof of the
petitioning
creditor's debt.

Where however the debt is founded on a bill of exchange, it is sufficient if the debt vest in the petitioning creditor, before the suing out of the commission, although after the bankruptcy (*a*). Where a bill is drawn by the bankrupt in favour of a third person, before the bankruptcy, and indorsed by the latter to the petitioning creditor, it must be proved that the indorsement was made before the suing out of the commission (*b*).

standing an order that it shall be taxed by the Master, and that in the mean time all proceedings shall be stayed. 1 Mont. B. L. 36.

A creditor who has received a dividend under a composition-deed in ignorance that it was executed after an act of bankruptcy, is not estopped from suing out a commission. *Doe d. Pitcher v. Anderson*, 5 M. & S. 161. But a creditor who has assented to the deed of assignment cannot set it up as an act of bankruptcy. *Bamford v. Baron*, 2 T. R. 594. n. But a mere assignee, though privy to the assignment, is not estopped, for he is but a trustee, *Tappenden v. Burgess*, 4 East, 230. So a creditor may petition, though the trader has taken the benefit of an insolvent act, and included the debt in the schedule. *Jellis v. Mountford*, 4 B. & A. 256.

(*o*) 9 East, 498, 500, *Hoskins v. Duperoy*, 6 Esp. 55. S. C.: contra *Henbest v. Brown*, Peake C. 54. See *Paralow v. Dearlove*, 4 East, 438. *Sarratt v. Austin*, 4 Taunt. 203. *Ex parte White*, 3 V. & B. 130.

(*x*) See the stat. 7 Geo. 1, c. 51; 5 Geo. 2, c. 30.

(*y*) *Cothay v. Murray*, 1 Camp. 335. So if the creditor has elected to give credit for nine months. *Price v. Nixon*, 5 Taunt. 338. [7 Johns. 467, note, 2d. ed.]

(*z*) *Hoskins v. Duperoy*, 6 Esp. 55; 9 East, 498, 500.

(*a*) *Bingley v. Maddison*, Co. B. L. 24; *Rose v. Rowcroft*, 4 Camp. 245; *Glaister v. Hewer*, 7 T. R. 498; *Brett v. Levett*, 13 East, 218.

(*b*) *Rose v. Rowcroft*, 4 Camp. 245. Where *A.* drew a bill in favour of *A.* to whom he was previously indebted to that amount, and *A.* committed an act of bankruptcy before the bill was due, or had been presented, it was held to be a good petitioning creditor's debt, although subsequently to the commission it had been duly presented and paid. *Ex parte Douthat*, 4 B. & A. 67. See *Macarty v. Barrow*, Str. 949; *Chilton v. Whiffin*, 3 Wils. 17; *Starey v. Barns*, 7 East, 435.

A debt arising on an accommodation bill not paid till after the bankruptcy is insufficient. *Ex parte Holding*, 1 Gl. & J. 97.

A husband may petition in his own name in respect of a note given to the wife before coverture. *Ex parte Barker*, 1 Gl. & J. 1.
Interest

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IV.Proof of the
petitioning cre-
ditor's debt.

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A creditor who receives a sum of money after notice of the act of bankruptcy, sufficient, if taken in payment, to reduce his debt below the sum of 100*l.*, may still sue out a commission (c). And so may a creditor who has taken in part payment the bill of the trader on a drawee, who had no effects of the trader's in his hands, although the creditor gave no notice of the dishonour of the bill (d). A judgment-creditor who has taken his debtor in execution cannot afterwards sue out a commission of bankrupt (e) on the same debt. * Damages for breach of promise of marriage, the verdict being before, but the judgment after an act of bankruptcy, will not support a commission (f).

A warrant of attorney given as a security against running acceptances is a *debitum in presenti*, which will support a commission (g).

The evidence to prove the debt is the same as if the action had been brought against the bankrupt (h). Therefore an admission of the debt by the bankrupt *before his bankruptcy* is evidence (i). So are entries in the bankrupt's books (k), or declarations of the bankrupt before the bankruptcy; and in some instances, declarations by the bankrupt as to the debt, made after the act of bankruptcy, but before the commission, have been received in evidence (l). But an acknowledgment by a trader of a debt by bond does not supersede the necessity of proving it by a third person (m).

Interest, where it is not expressed in the body of the bill, cannot be added to make up the amount of the debt. *Ex parte Burgess*, 2 Moore, 745.

A debt kept alive by process and continuances is sufficient. *Gregory v. Harrill*, 3 B. & B. 212; *Taylor v. Hopkins*, 5 B. & A. 489,

(c) *Mann v. Shepherd*, 6 T. R. 79.

(d) *Bickerdike v. Bollman*, 1 T. R. 405.

(e) *Cohen v. Cunningham*, 8 T. R. 123.

(f) *Ex parte Charles*, 14 East, 197.

(g) *Miles v. Rawlins*, 4 Esp. 194.

(h) B. N. P. 37. *Abbott v. Plumbe*, Doug. 216.

(i) *Brett v. Levett*, 13 East, 213; 2 H. B. 279. *Dowton v. Cross*, 1 Esp. 168. *Hoare v. Coryton*, 4 Taunt, 560.

(k) *Jackson v. Irwin*, 2 Camp. 50. *Watts v. Thorpe*, 1 Camp. 376.

(l) *Brett v. Levett*, 13 East, 213, where the declaration of a bankrupt made after the act of bankruptcy, but before the commission, was admitted, in order to supply proof of notice to him of the dishonour of the bill of exchange; and see *Dowton v. Cross*, 1 Esp. C. 168. But see *Watts v. Thorpe*, 1 Camp. 376. 2 Camp. 49. *Hoare v. Coryton*, 4 Taunt. 560. *Robson v. Kemp*, 4 Esp. C. 233.

(m) *Abbott v. Plumbe*, Doug. 216.

The date upon a promissory note is not even *prima facie* evidence to show that it had existence prior to the act of bankruptcy (*n*).

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* Where the debt is due to two jointly, it must appear that both concurred in the petition (*c*).

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Proof of the
petitioning
creditor's debt.

Proof that the bankrupt and petitioning creditor attended before the commissioners, and discussed the amount of the debt, and that the commissioners struck off items objected to, and struck a balance in favour of the petitioning creditor, is presumptive evidence from the conduct and demeanor of the bankrupt, (the plaintiff in the action) of a balance to that amount; but it is not evidence in the nature of an adjudication or award (*p*). Where the petitioning creditor petitions as the assignee of a bankrupt, it is necessary to prove all the steps of the former bankruptcy (*q*).

Where no notice has been given under the stat. 49 Geo. III., c. 121, a debt is sufficiently proved by the deposition of the petitioning creditor himself, although if he had been called he would not have been a competent witness (*r*).

By the stat. 5 Geo. II, c. 30, upon petition of any person to the Great Seal, he may direct the depositions and proceedings to be entered of record, and upon the loss of the proceedings or deaths of the witnesses, a true copy of such record, signed and attested, will be evidence (*s*).

By the stat. 49 Geo. III, c. 121, s. 10, it is provided, * that in any action now brought, or to be brought, by or against (*a*) any assignee of any bankrupt (*t*), the commission

Proof by depo-
sitions.
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(*n*) The contrary was held in *Taylor v. Kinloch*, 1 Starkie's C. 175, upon a mistaken report of a case (cited from memory) which had been tried on the northern circuit. This case was mentioned by Bayley, J.; and it appears that further evidence was held to be necessary to prove the question previous to the bankruptcy. And see 4 Camp. 245, *supra*, n. (*b*). ●

(*o*) *Buckland v. Newsame*, 1 Taunt. 477; 1 Camp. 474. S. C. But a commission may be sued out against one of several partners by a joint-creditor. *Crispe v. Perritt*, Willes, 467. See the words of the stat. 5 Geo. II. c. 30, s. 23, which requires that the single debt of the creditor of two or more persons being partners, petitioners for the commission, shall amount to the sum of 100*l*.

(*p*) *Jarrett v. Leonard*, 2 M. & S. 265.

(*q*) *Doe v. Liston*, 4 Taunt. 741. See *Antram v. Chace*, 15 East, 209.

(*r*) *Bisse v. Randall*, 2 Camp. 493.

(*s*) *Seemle*, the signing and attestation should be by the person authorized under the stat. to enter the proceedings on record, and to keep them in his custody. See Christian's B. L. Vol. II.

(*a*) *De Charme v. Lane*, 2 Camp. 324.

(*t*) The statute extends to cases where other defendants besides

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 Proof by depositions.

of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if defendant at or before the time of his pleading to such action, and if plaintiff before issue joined (*u*) in such action, give notice (*x*) in writing to such assignee that he intends to dispute such matters, or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the judge before whom the cause shall be tried, shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial; and such assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs which such other party would otherwise be entitled to receive from such assignee.

* 164 The assignees, being plaintiffs, are entitled to read the proceedings in the course of the evidence, unless the defendant proves his notice, which may be done as * soon as the assignees attempt to make the proceedings evidence (*y*).

Notice given with a plea *de novo*, is sufficient (*z*). But a defendant who has delivered a plea without notice, cannot, even before the time for pleading is expired, re-deliver his plea with notice (*a*).

If no notice has been given, the proceedings may be read on shewing that they come out of the proper custody,

the assignees are joined in the action. *Gilman v. Cusins & others*, 2 Starkie's C. 282. *Smith v. Nicholson*; York Ass. Cor. Richards, C. B. and afterwards by the court of Exchequer.

(*u*) Notice by the plaintiff, served at the time when the issue is delivered with notice of trial, is too late. *Richmond v. Heapy*, 4 Camp. 207.

(*x*) Service of notice on a maid servant at the dwelling-house of the assignee is insufficient. *Howard v. Ramsbottom*, 3 Taunt. 526.

(*y*) Notice is necessary in an action against the assignees, (as by the bankrupt to try the question of bankruptcy,) although the defendants are not described as assignees upon the record. *Simmonds v. Knight*, 3 Camp. 251.

(*z*) *De Charme v. Lane*, 2 Camp. 324. If no notice has been given before the delivery of the plea, the court will give the defendant leave to withdraw the plea, in order to plead again with notice. *Radmore v. Gould*, Wightw. 80. *Poole v. Bell*, 1 Starkie's C. 328.

(*a*) *Poole v. Bell*, 1 Starkie's C. 328.

i. e. of the solicitor under the commission (*b*). The effect of the statute is merely to make the proceedings evidence, and not to make them conclusive evidence; and therefore the defendant is at liberty to object to the sufficiency of the evidence on the face of the depositions, to controvert, explain or disprove the facts contained in them (*c*). And if the facts contained in the deposition, if proved in the usual course, would have been insufficient to support the commission, the evidence will still be insufficient; as where the deposition merely stated that the petitioning creditor's debt was due at the time of the commission, without shewing that it was due at the time of the act of bankruptcy (*d*). So where it stated that the bankrupt departed from his house, and that he admitted that he went for the purpose of delaying his creditors, without shewing that the declaration was cotemporary with the act (*e*). * But as far as * 165 the deposition goes it is evidence, although it might not have been admissible in the usual course of evidence.

A deposition by a petitioning creditor is evidence to prove the debt, although the deponent himself would not have been a competent witness (*f*). So a deposition, stating that the trader executed an assignment of all his property to a creditor, is evidence of an act of bankruptcy, although the deed of assignment is not produced (*g*). It is competent to the court to decide that the facts alleged in the depositions are insufficient, in point of law, to support the bankruptcy (*h*). Depositions.

If the plaintiff's notice in an action against the assignees relate to the act of bankruptcy only, and the depositions are read to prove the trading and petitioning creditor's debt, the proceedings as to the act of bankruptcy are not in evidence; and to entitle the plaintiff to inspect them he must call for them in the course of his own case (*i*).

Where the assignees are strangers to the record, and their title comes in question incidentally, the bankruptcy must be proved as before the statute, although no notice

(*b*) *Collinson v. Hillear*, 3 Camp. 30.

(*c*) *Mills v. Bennett*, 2 M. & S. 556. *Ellis v. Shirley*, 3 Camp. 424; *contra*, *Humphries v. Coggan*, 1 Rose, 226.

(*d*) *Clarke v. Askew*, 1 Starkie's C. 458.

(*e*) *Ibid*.

(*f*) *Bisse v. Randall*, 2 Camp. 493.

(*g*) *Key v. Stead*, 2 Starkie's C. 200.

(*h*) *Marsh v. Meager*, 1 Starkie's C. 353. *Brown v. Forrestal*, Holt's C. 190.

(*i*) *Bluck v. Thorne*, 4 Camp. 191.

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evidence.

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Proof of the
assignment.

has been given (*k*). The depositions are evidence, no notice having been given, although other persons are made co-defendants with the assignees (*l*).

Where a defendant, whether the bankrupt himself, or any other person, has done any act by which he acknowledges the bankruptcy, the proof of that act, as against that person, supersedes the necessity of the regular detailed proof. Where an auctioneer, in a catalogue of goods for sale, describes them to be “the property of the bankrupt” (*m*), it is *prima facie* evidence of * the fact. So where a debtor to the bankrupt, for goods sold by the latter, stated an account to the plaintiff as assignee, and paid him part (*d*). But a trader declared to be a bankrupt does not, by surrendering under it, preclude himself from disputing the legality of the commission, for he is bound by law to surrender himself (*e*) (1); neither is a creditor who has received part of the debt before the commission, and proves the rest under it, estopped from disputing it in an action brought by the assignees to recover the first payment (*n*). The proving a debt under a commission is not even *prima facie* evidence of the bankruptcy in an action by the assignees against the creditor (*o*).

5thly. The assignment is proved by producing the deed, and proving the execution by the commissioners, by means of an attesting witness (*p*).

(*k*) *Mills v. Bennett*, 2 M. & S. 556.

(*l*) *Gilman v. Cousins*, 2 Starkie's C. 182. Where the deposition stated that the petitioning creditor's debt was due to *A. & B.* as the assignees of *C.*, it was held that the deposition was evidence of the fact, so as to supersede the necessity of proof of the bankruptcy of *C.* *Skaife v. Howard*, 2 B. & C. 560.

(*m*) *Matlby v. Christie*, 1 Esp. C. 340. 1 B. & A. 677. 16 East, 193.

(*d*) *Dickenson v. Coward*, 1 B. & A. 677.

(*e*) 9 East, 21; 1 Taunt. 80, 84, 96. *Ex parte Jones*, 11 Ves. 409. Nor do the formal words of the petition for enlarging the time of his surrender amount to such an admission.

(*n*) *Stewart v. Rickman*, 1 Esp. 108. *Hope v. Fletcher*, Sel. N. P. 238. *Collins v. Forbes*, 3 T. R. 322. But see *Walker v. Burnell*, Doug. 317; where it was held that the assignees under a former commission, after proving a debt under the second commission, could not dispute it.

(*o*) *Rankin v. Horner*, 16 East, 191. As to presumptions against the bankrupt himself, *vid. infra*, 202; & *supra*, tit. *Admissions*.

(*p*) *Vide supra*, Vol. I. p. 331.

(1) [See cases, under the U. S. bankrupt law, collected in Mr. Day's note to *Donovan v. Duff*, 9 East, 25.]

Where the title of the assignees to freehold lands comes in question, the bargain and sale of the lands by the commissioners to the assignees must be proved, as also its enrolment, within six months after the date of the deed (*q*), of which the indorsement of enrolment, or an examined copy, is conclusive evidence. This has no relation to the bankruptcy, so as to vest the property in the assignees from that time, and therefore they cannot recover for a trespass, or on a * demise in ejectment anterior to the bargain and sale, although subsequent to the bankruptcy (*a*). * 167

If there has been a provisional assignment it should be proved in the usual way (*r*).

II. Where the assignees have proved their title to sue in that character, they proceed to prove the cause by action. In some instances, the proof is just the same as if the action had been brought by the trader himself (*s*); and there is nothing in the evidence which is *peculiar* to bankruptcy, except indeed that the bankrupt himself, after having obtained his certificate and released the assignees, is a competent witness (*t*). In many instances, however, the evidence is peculiar to bankruptcy, since it frequently happens that the assignees may disaffirm the bankrupt's act, and maintain an action where the bankrupt himself would have been bound by his own act. Evidence by assignees in particular actions.

Where the assignees seek to recover money, or the value of goods, in *disaffirmance* of the act of the bankrupt, they must show, not only in the first place, that the property in the goods once *vested* in the bankrupt, but must also, in the second place, give evidence to *avoid* the act of the bankrupt. This may be done, 1st, by proving an act of bankruptcy, previous to the conversion, with a petition- Previous act of bankruptcy.

(*q*) For the proof, *vide supra*, *Bargain and Sale*, Vol. I. 366. *The King v. Hopper*, 3 Price, 495. Doug. 56.

(*a*) *Doe v. Mitchell*, 2 M. & S. 446. See *Elliot v. Danby*, 12 Mod. 3. *Perry v. Bowes*, 1 Ventr. 360. [T. Jones, 196. S. C.] An order by the chancellor to supersede the commission does not divest the legal estate. *Bloxam v. Hubbard*, 5 East, 407.

(*r*) See 2 Christian's B. L. 448. If the action be brought by the provisional assignee, who sues out a *latitat*, it is no defence that other assignees were appointed between the issuing of the writ and the declaration. *K. B. Page v. Vaughan*, Mich. Term, 1820.

(*s*) They may adopt and rely upon a contract made by the bankrupt subsequently to his bankruptcy. *Butler v. Carver* and others, 2 Starkie's C. 434. The assignees may either enforce or reject such a contract at pleasure. If a bankrupt after his bankruptcy sell goods, the assignees may bring either *trover* or *assumpsit* for the value. *Hussey v. Feddall*, 3 Salk. 59. Holt, 95. 12 Mod. 324.

(*t*) *Vide infra*.

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ing creditor's debt to support * it, for after that period the bankrupt had no disposing power over the goods. (1). Or, 2dly, if the act of the bankrupt which would bar an action at his own suit, was done previous to the bankruptcy, the assignees, in order to defeat that act, may prove that it was done *voluntarily* by the bankrupt, in contemplation of bankruptcy, with intent to give preference to a particular creditor. So also, 3dly, it is frequently incumbent on the assignees, even where the transaction with the bankrupt, which is relied upon by the defendant, has occurred subsequently to the bankruptcy, to give evidence to impeach that transaction. This happens where some statute, in restraint of the general rule that the bankruptcy defeats all subsequent acts of the bankrupt, protects the transaction in the particular instance, unless the assignees can by proof bring the case within some exception in the same statute. 4thly. The assignees may rest their claim upon the mere possession by the bankrupt of property as the reputed owner, under the stat. 21 Jac. I. c. 19.

In the first place, the right of property in the bankrupt must be proved in the same manner as if the action had

(1) [Assignees under the U. States bankrupt law (1800) in actions brought by them were held to prove the debt of the petitioning creditor, except in actions against debtors of the bankrupt, under the 56th section of the act. *Den v. Wright & al.* 1 Peters' Rep. 64. The 56th section of that act made the commission and assignment conclusive evidence of the trading and act of bankruptcy in all cases where the assignees should prosecute any *debtor* of the bankrupt for any *debt, duty, or demand.* *Barston v. Adams*, 2 Day, 70. But this was held not to apply to an action of *trover* by the assignees. *Rugan v. West*, 1 Binney, 263. *Lovett v. Cutler*, 1 Mass. Rep. 68.—It has been held in Kentucky, that in an action by a purchaser under the assignees of a bankrupt, proof of the trading and of the act of bankruptcy, and of the petitioning creditor's debt is necessary. *Hart v. Strode*, 2 Marsh. 115. See 1 Peters' Rep. *ubi sup.* In ejectment by the vendee of the assignees against one who claimed by a title adverse to the bankrupt, it was held that the plaintiff was not bound to prove the trading and act of bankruptcy. *Scott v. Leather*, 3 Yeates, 184. So in 1 Peters' Rep. *ubi sup.* it was held that in ejectment, if one of the counts were upon the demise of the assignees, and the other on the demise of the bankrupt himself; and the plaintiff failed to prove the petitioning creditor's debt, so as to support the first count, he might rely on the other, although the deed of the assignees recited the bankrupt's assignment, &c.

The certificate of a bankrupt's conformity was *conclusive* evidence (under the U. S. statute of 1800) of the issuing of the commission, and of the trading and bankruptcy, in an action by the assignees against the bankrupt's debtor; but was only *prima facie* evidence of those facts in an action by a creditor against the bankrupt. *Blythe & al. v. Johns*, 5 Binney, 247. See also *Jenkins v. Stanley*, 10 Mass. Rep. 226. *Bissel & al. v. Post*, 4 Day, 79.]

been brought by the trader himself, in case bankruptcy had not intervened (*u*).

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The peculiar privilege which the law has conceded to the vendor of goods to a bankrupt, of stopping them in *transitu* before they come, in technical language, to the very touch of the consignee, frequently imposes upon the assignees the necessity of proving, not only that there was such a delivery of the goods to an agent of the trader as would in ordinary cases vest the property in him irrevocably, as by a delivery to a carrier; * but also that the *transitus* of the goods was actually completed. * 169

Proof of title in
the trader.

Whether the stoppage was in *transitu*, or after its completion, seems to be a question of law (*x*). In order to raise that question, it is usual materially to prove on whose risk and account the goods were sent; the character and situation of the agent in whose actual possession the goods were at the time of stoppage (*y*); by whom employed, and by whom to be paid; the possession, indorsement, &c. of the bill of lading (*z*); the place and object of destination (*a*),

(*u*) See *Trover*. The bankruptcy of the vendee after the contract, but before the delivery, does not avoid the contract; a subsequent delivery at the house of the bankrupt, although without receiving payment, will preclude the vendor from recovering in *trover* against the assignees. *Haswell v. Hunt*, cited 5 T. R. 231.

(*x*) See *Feise v. Wray*, 3 East, 93. *Mills v. Ball*, 2 B. & P. 457. 3 B. & P. 119, 469. 5 East, 175. 14 East, 308. 2 H. B. 504. Part payment does not take away the right of stoppage. (*Hodgson v. Loy*, 7 T. R. 440. *Feise v. Wray*, 3 East, 93.) Nor does the usage of carriers to insist on a lien on goods for a general balance of account between them and the consignees at all affect the right. *Openheim v. Russel*, 3 B. & P. 42.

(*y*) If he was the mere agent of the consignor, at whose risk the goods were sent, the delivery to him would not vest any property in the consignee; and the question, whether the property was divested by a stoppage in *transitu* would not arise. See *Coze v. Harden*, 4 East, 211. *Walley v. Montgomery*, 3 East, 585. See, as to the delivery of plate by a silversmith to an engraver, who was to be paid by the vendor to get the vendee's arms engraved thereon (*Owenston v. Morse*, 7 T. R. 64.) As to goods delivered by the consignor on board a ship chartered by the consignee, see *Bothlingk v. Inglis*, 3 East, 381. *Inglis v. Usherwood*, 1 East, 515. *Coze v. Harden*, 4 East, 211. To a wharfinger, *Mills v. Ball*, 2 B. & P. 457.

(*z*) In general, the indorsement by the consignee of the bill of lading for a valuable consideration will divest the right of stoppage. *Lickbarrow v. Mason*, 2 T. R. 63. 2 H. B. 211. 5 T. R. 367. *Feise v. Wray*, 3 East, 93. Otherwise where there is no consideration. *Newson v. Thornton*, 6 East, 17.

(*a*) *Dixon v. Baldwin*, 5 East, 175. *Leeds v. Wright*, 3 B. & P. 320. *Scott v. Petit*, 3 B. & P. 469. The general rule seems to be, that if by appointment, as between the consignor and consignee,

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signees,

* and the nature of the acts exercised upon them in their progress (b), with a view to take possession of them.

In an action of trover, brought on a conversion *before* the bankruptcy, the proof is the same as if the action had been brought by the bankrupt. Where it is brought on a conversion after the bankruptcy, although before the commission, it is in general unnecessary to prove an *actual demand*, since the property vests in the assignees by relation, so as to avoid all mesne acts (c). But where they disaffirm a delivery on a contract made by the bankrupt in *contemplation* of bankruptcy, a *demand* by the assignees must be proved (d), since there was no unlawful taking, although the contract was liable to be impeached by the assignees. They may either affirm or disaffirm the contract, and if they disaffirm it, they ought to demand the goods, and then the refusal to deliver them will be evidence of a conversion.

Goods delivered by *A.* to *B.* on a contract of sale, vest in *B.* by the delivery, and in his assignees, on his becoming a bankrupt, although *B.* intended to defraud *A.* (e) in respect of the payment (1).

In trover.

The very purchasing of goods from a trader, *after* an act of bankruptcy has been committed, is a conversion, and the assignees may maintain trover, although they have demanded payment for the goods (f).

* 171 * If a sheriff seize and sell goods under an execution, *after* an act of bankruptcy, even without notice, and before the commission, he is liable in trover (g), and the

the goods are to be sent to a particular place, where they are to await the orders of the vendee as to any further destination, the *transitus* is completed when they arrive there.

(b) The putting a mark on the goods by the assignee of the consignee at the inn whither they were sent for the latter, held to divest the consignor's right of stoppage in *transitu*. *Ellis v. Hunt*, 3 T. R. 464. And see *Core v. Harden*, 4 East, 211.

(c) *Kiggil v. Player*, 1 Salk. 111. B. N. P. 41. 2 Starkie's C. 306.

(d) *Nixon v. Jenkins*, 2 H. B. 135.

(e) *Milward v. Forbes*, 4 Esp. C. 171. But if *A.* by false pretences procure a bill from *B.*, and the assignees of *A.* afterwards receive the amount, they are liable to *B.* for the amount. *Harrison v. Walker*, Peake's C. 111. See post, *Trover*, p. 1643.

(f) *Hurst v. Gwennap*, 2 Starkie's C. 306. *

(g) This has been so decided upon argument in the court of Ex-

(1) [The assignees, and not individual creditors, have the right to sue for property fraudulently conveyed by the bankrupt, and withheld from the list of the estate given in. *Edwards v. Coleman*, 2 Bibb, 204.]

assignees are not bound to prove any demand, since the execution was tortious (*h*). And if the creditor assisted in the levying the execution, trover will lie against him, although the money remain in the hands of the sheriff (*i*). Where the sheriff seized the goods in execution, and afterwards, but on the same day, the trader surrendered himself in discharge of his bail, and committed an act of bankruptcy by lying in prison for two months, it was held that the assignees were not entitled to recover (*k*). Trover.

The assignees cannot recover in trover the amount of a cheque paid by the bankrupt's bankers after the bankruptcy, against a creditor to whom the cheque had been delivered and the money paid (*l*); neither can they recover in trover for bills fraudulently obtained from the bankrupt, after his bankruptcy, for the bankrupt never could have any property in them; but if the party obtaining them receive the proceeds, the assignees may recover for money had and received (*m*).

It has been held, that the assignees may recover from a creditor in England, money which he has attached abroad, after the assignment, as money had and received to their use (*n*). So they may recover, in * the same form of action, money paid by a trader for the carriage of goods after a secret act of bankruptcy (*o*): money which is the produce of goods pledged by the trader's direction, after being arrested at the defendant's suit, but without his privity, after a secret act of bankruptcy, and paid over to the defendant, although not the identical money raised by the pledge (*p*); money received by the banker of the bank- Money had and received, * 172

chequer. See *Smith v. Mills*, 1 T. R. 475. *Bailey v. Bunning*, 1 Lev. 173. *Cole v. Davis*, 1 Ld. Raym. 724. *Cooper v. Chitty*, 1 Burr. 20; and the cases collected, 1 Montague's B. L. 474. The single question determined in *Bayley v. Bunning*, and reserved by the special verdict, was, whether the taking was lawful; and upon that the court determined. B. N. P. 41.

(*h*) *Rush v. Baker*, B. N. P. 41.

(*i*) *Menham v. Edmonson*, 1 B. & P. 369.

(*k*) *Thomas and others v. Desanges and another*, 2 B. & A. 586. See *Time*.

(*l*) *Matthew v. Sherwell*, 2 Taunt. 439.

(*m*) *Walker v. Laing*, 1 Moore, 281. Dispositions by process of law stand on the same footing with dispositions by the bankrupt; to be valid they must be complete before the bankruptcy; per Lord Mansfield, Burr. 32; and see 2 B. & A. 588.

(*n*) *Hunter v. Potts*, 4 T. R. 182. See also *Sill v. Worswick*, 1 H. B. 665. *Phillips v. Hunter*, 2 H. B. 482.

(*o*) *Bradley v. Clark*, 5 T. R. 197.

(*p*) *Allanson v. Atkinson*, 1 M. & S. 583.

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and received.

rupt, and paid over to a creditor with knowledge of the bankruptcy (*q*), or to the bankrupt.

Where a trader in prison employed an auctioneer to sell his goods, who returned him the proceeds by the hands of the defendant, who was the mere bearer, it was held that the assignees could not recover the money from him (*r*).

Where a debtor to the bankrupt on policies of insurance, which have been deposited by the bankrupt with a creditor as a collateral security after a secret act of bankruptcy, gives his acceptance, which he afterwards pays to the creditor, the assignees cannot recover the amount from the creditor, although the broker who paid the money retained the amount so paid by him on settlement with the assignees, for it was the money of the broker, and not of the bankrupt (*s*).

Where the trader has sold goods at prices very inferior to their value, the assignees cannot recover the difference (*t*). After the removal of one assignee, it seems that the remaining assignee may maintain an action against him for money had and received (*u*).

- * 173 * Where a bill of exchange was indorsed by the bankrupt after his bankruptcy, and the indorsee received the amount, it was held that the assignees could not recover for money had and received, but must resort to the action of trover from the bill (*x*).

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preference.

III. Next, where the object is to disaffirm a delivery or contract, made by the bankrupt on the ground of a voluntary and fraudulent preference to a particular creditor, the assignees must show that the transfer was made on the eve of bankruptcy, and in *contemplation* of bankruptcy, *voluntarily*, in order to favour the creditor. The fact that it was made *in contemplation* of bankruptcy, is one which may be presumed from the particular circumstances of the case, from the conduct and declarations of

(*q*) *Vernon v. Hankey*, 2 T. R. 115. But they cannot afterwards recover from the creditor. *Vernon v. Hanson*, 2 T. R. 287.

(*r*) *Coles v. Wright*, 4 Taunt. 198.

(*s*) *Hovil v. Pack*, 7 East, 163; and see *Willis v. Freeman*, 12 East, 656.

(*t*) *Hogg v. Mitchell*, 1 Starkie's C. 241.

(*u*) 5 T. R. 601. *Wray v. Barwis*, Peake's C. 69. *Smith v. Jamieson*, Peake's C. 213.

(*x*) *Waller v. Drakeford*, 1 Starkie's C. 481, and afterwards by the Court of K. B. But see *Walker v. Laing*, 1 Moore, 282, *supra*, p. 171.

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the parties at the time, or of the defendant since the transfer, from the proximity of the transaction to the bankruptcy, the time and circumstances of making the transfer, as where it was made secretly at an unseasonable hour of the night, when the trader was in embarrassed circumstances, and knew that he was insolvent, from his afterwards absconding: these, and other such facts, are strong indications to induce the jury to conclude that the trader *contemplated* bankruptcy (1). Where it has been shown that the defendant received payment or the possession of goods under such circumstances, on the eve of bankruptcy, a presumption of voluntary preference seems to arise from the evidence, sufficient to throw the burthen upon the defendant of showing that the delivery or payment was not voluntary, but the result of importunity or compulsion. Proof on the part of the assignees, that the preference was *voluntary*, consists either in declarations on the subject made by the bankrupt at the time in his sending for the creditor of his own accord * to pay him, without any previous application, or in any other circumstances which show a *forwardness* on the part of the bankrupt to satisfy the particular creditor in preference to the rest (*w*). * 174

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preference.

Evidence in answer to a case of voluntary preference, consists of circumstances tending to show that the transaction was not voluntary on the part of the trader, but was the result of importunity or compulsion. It is not voluntary if it be made under the apprehension that a degree of force, civil or criminal, is about to be ap- Evidence in answer.

(*w*) A voluntary payment under circumstances which might reasonably lead the debtor to suppose bankruptcy to be probable, though not inevitable, is a fraud on creditors. *Poland v. Glyn*, 2 D. & R. 310; see *Fidgeon v. Sharp*, 5 Taunt. 539. *Harman v. Fisher*, Cowp. 117.

(1) [Under the bankrupt law of the United States, (1800) it was held that the giving of a preference to one creditor did not constitute an act of bankruptcy—though if given on the eve of a bankruptcy, and in contemplation of it, it was void. *Barnes v. Billington*, Circuit Court, April 1803. Wharton's Digest, 75. In *Phanix v. Assignees of Ingraham*, 5 Johns. 412, it was held that a preference given to one creditor, though voluntary, was valid, unless done in contemplation of bankruptcy: And even if an act of bankruptcy were contemplated by the debtor, yet if, at the instance, and on the application of a particular creditor, he paid him, or assigned him property; such payment or assignment was valid as against the assignees. *S. P. Ogden v. Jackson*, 1 Johns. 370. *Secus*, if done without compulsion, and with a view to prefer one creditor to another. *ibid.* See also *McMenomy v. Ferrers*, 3 Johns. 71.]

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plied (*y*). *A.* having in September discounted three bills for *B.*, afterwards suspecting his credit, required a security to be put into his hands, and *B.* accordingly, at different times, between November and February, deposited books to the amount of 300*l.* with him, to be sold by him for his own benefit, in case the bills should not be paid by the acceptors, the books were chiefly brought by *B.* in a hackney coach, in the evening; *B.* committed an act of bankruptcy in March, and *A.* had then the bills unpaid in his hands. Upon an action brought by the assignees, they were nonsuited, on the ground that there was no voluntary preference since the bankrupt parted with the books upon the defendant's importunity; and although the bills were not due, the defendant was liable upon them, and had a right to a further security (*z*).

Where *B.* had property to a large amount at the custom-house, which stood in his own name, but which he had purchased with *A.*'s money, and there was evidence to show that he had been induced to transfer the whole to *A.*, under the apprehension that *A.* would prosecute him for the forgery of a bill which he had deposited with *A.* as a security, it was left to the jury * to say whether the transfer was voluntary, or made under the apprehension that a degree of force, civil or criminal, was about to be applied; and Lord Ellenborough informed them, that every thing which might overcome the free-will of the party was sufficient to exclude a voluntary preference (*a*). So payment to an obligee, who importunes for payment before the forfeiture of the bond, is good (*b*).

Where a trader, in contemplation of bankruptcy, voluntarily sent his clerk to pay the amount, but before the payment the creditor applied for payment, it was held to be good (*c*).

Where the holder of a bill promised the acceptor, whom he knew to be insolvent, that if the bill was paid he would effect a composition with his creditors, the preference was held to be fraudulent (*d*).

(*y*) *De Tastet v. Carroll*, 1 Starkie's C. 88. And see *Atkins v. Seward*, Cor. Holroyd, J. Winchester Spring Assiz. 1819, Manning's Index, 2d edit. 63.

(*z*) *Crosley v. Crouch*, 2 Camp. 166. 11 East, 256.

(*a*) *De Tastet v. Carroll*, 1 Starkie's C. 88.

(*b*) *Hartshorn and others v. Slodden*, 4 Esp. C. 60. 2 B. & P. 582. *Thompson v. Freeman*, 1 T. R. 155. *Thornton v. Hargreaves*, 7 East, 544. *Crosley v. Crouch*, 11 East, 256.

(*c*) *Bayley v. Ballard*, 1 Camp. 416.

(*d*) *Singleton v. Butler*, 3 Esp. C. 215. 2 B. & P. 283. *Smith v. Payne*, 6 T. R. 152.

Where a trader purchased goods on the 8th of October, for the purpose of exportation, but finding that he must stop payment, and that he could not export them, returned them on the 16th of October to *B.* the vendor, and stopt payment on the 17th; and his creditors refusing him time, he became a bankrupt on the 2d of November; it was held, that the jury were warranted in finding that the delivery of the goods to *B.* was not in contemplation of bankruptcy (*e*). Voluntary preference.

Where a creditor obtained a preference not fraudulent, with a view to an intended composition with creditors, but without any view to a bankruptcy, and the composition never took place, but the trader afterwards became bankrupt, it was held that the creditor was entitled to retain his securities (*f*).

* Where a sale has been completed by the actual delivery of goods to a trader, before payment, he cannot give the vendor a preference by rescinding the contract and returning the goods (*g*). But where goods in *transitu* are given up by the trader, it is a question for the jury whether they were given up *bonâ fide*, and without any motive of undue and voluntary preference, although the trader was on the verge of bankruptcy (*h*). * 176

Goods being sent to a trader in February, with an option, according to the course of trade, of returning them, he having done no act to determine his option, on the 4th and 5th of March returned the goods, requesting a written approbation of his act, being then insolvent; such approbation was not given till after the bankruptcy, and it was held that the property passed to the assignees (*i*).

IV. The general effect of a bankruptcy, is to avoid all transactions with the bankrupt posterior to the act of bankruptcy. This relation of the rights of the assignees is restricted by particular statutes which in particular cases protect *payments* made to and by the bankrupt, and makes it incumbent on the assignees to prove a *knowledge* of the act of bankruptcy on the part of the defendant, in order to defeat the payment. Proof to defeat payment, &c.

By the stat. 1 Jac. I. c. 15, s. 14, no debtor of the bank-

(*e*) *Fidgeon v. Sharp*, 1 Marsh. 196. [5 Taunt. 539, S. C.]

(*f*) *Wheelwright v. Jackson*, 5 Taunt. 109.

(*g*) *Barnes v. Freeland*, 6 T. R. 80. See *Haswell v. Hunt*, cited 5 T. R. 231; and *Neate v. Ball*, 2 East, 117.

(*h*) *Dixon v. Baldoen*, 5 East, 175.

(*i*) *Neate v. Ball*, 2 East, 117.

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rupt shall be endangered for the payment of his debt, truly and *bonâ fide* made to any such bankrupt before such time as he shall *understand or know* that he is become a bankrupt (*k*).

* 177 * By stat. 21 Jac. I c. 19, s. 14, no *purchaser* for a good and valuable consideration shall be impeached by virtue of this or any other act theretofore made against bankrupts, unless the commission to prove him a bankrupt be sued forth against such bankrupt within five years after he shall become a bankrupt.

The 46 Geo. III. c. 135, s. 1, directs, that in all commissions of bankrupt thereafter to be issued, all conveyances by all payments by and to, and all contracts and other dealings and transactions (*l*), by and with any bankrupt *bona fide* made and entered into more than two calendar

(*k*) Where no intention to sue out a commission has been manifested, it is no defence to an action by a trader who has committed an act of bankruptcy, that the defendant has had notice of it, since the payment being made under coercion of law, will afterwards be ~~valid~~ against the assignees. (*Foster v. Allanson*, 2 T. R. 479). So if two partners in a firm stop payment, and a commission be taken out against one of them, a debtor of the firm, although he has notice, cannot refuse payment of the debt. *Prickett v. Down*, 3 Camp. 131. The stat. 56 G. 3, c. 137, extends the provisions of the st. 1 Jac. 1, c. 15, sec. 14, to the delivery of goods, wares, &c. to the bankrupt before such time as the party shall *understand or know*, &c. The issuing of a commission is not in itself notice, and therefore payment after commission issued, but without actual knowledge, &c. is protected. *Sowerby v. Brooks*, 4 B. & A. 523. A trader after an act of bankruptcy sells goods to *B.* who *pays for them*, without knowledge of the bankruptcy; the assignees cannot maintain trover for the goods without tendering the money. *Cash v. Young*, 2 B. & C. 416; but see *Hurst v. Goennap*, 2 Starkie's C. 306. Note, in the latter case the goods had not been paid for.

A landlord with power of distress and re-entry, five quarters rent being in arrear, accepts the rent paid by a purchaser from the lessee, who is in prison; the payment is protected; for the landlord may waive his right of distress, and accept the rent. *Mavor v. Croom*, 1 Bing. 261.

Where money was paid by a bankrupt in prison (the lying in prison being the act of bankruptcy), whereby papers were obtained on which a creditor had a lien, whereby the assignees obtained possession of a ship, it was held that the payment was protected. *Thompson v. Beaton*, 1 Bing. 145.

(*l*) By *transactions* under this section are meant such as occur between parties in the usual course of business, and not such as are carried on through the medium of legal process (*Blogg v. Philips*, 2 Camp. 129), and therefore it does not extend to the levying under an execution by a creditor after a secret act of bankruptcy more than two months before the commission. But see the stat. 49 Geo. III. c. 121.

months before the date of such commission (*l*), shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good, provided the person so dealing with such bankrupt had not at the time of, &c. notice of any prior act of *bankruptcy* having been committed by such bankrupt, or that he was *insolvent* (*m*), or had stopped *payment*.

* By sect. 3, it is provided, that the issuing of a commission (*n*), although it shall afterwards be superseded, (1) (or the striking of a docket for the purpose of issuing a commission, whether any commission shall have actually issued therefrom, or not) (*o*), shall be deemed *notice* of a prior act of bankruptcy for the purpose of this Act, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission, or striking such docket.

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Proof to defeat payments, executions, &c.

By the stat. 49 Geo. III. c. 121, all executions and attachments against the lands and tenements, or goods and chattels of the bankrupt, *bona fide* executed or levied more than two calendar months before the date and issuing of such commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided the person at whose suit

(*l*) Where a bill was delivered by the trader with intent to transfer the property more than two months before the commission, but was not actually indorsed till within the two months, it was held that the indorsement had relation to the delivery. 1 Camp. 492. *n*.

(*m*) Compounding with creditors is evidence of insolvency (*Reader v. Knatchbull*, 5 T. R. 218 *n*.) But *insolvency* means a general inability to answer engagements. And in order to invalidate a payment made by the bankrupt two months before the commission, it has been held to be insufficient to show that the creditor has renewed bills for the debtor in consequence of the inability of the latter to provide for them (1 Camp. 492). Notice to a creditor that there has been a meeting of the bankrupt's creditors, and that the state of his affairs was such that the demands of creditors could not be paid, except the instalments, although the creditor was assured by the bankrupt's agent that they would come round, is notice of insolvency, such as to defeat a subsequent payment by the bankrupt to the creditor. *Bayly v. Schofield*, 1 M. & S. 338.

(*n*) By the issuing a commission is meant its passing under the great seal, whether it be opened or acted upon, or not. *Watkins v. Maund*, 3 Camp. 308.

(*o*) This clause is repealed by stat. 49 Geo. III. c. 121, s. 1.

(1) [A writ of supersedeas, reciting that a commission of bankruptcy issued on a day certain, is evidence that such a commission issued on that day. *Gervis v. Grand Western Canal Company*, 5 M. & S. 76.]

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such execution or attachment shall have issued had not at the time of executing or levying the same any *notice* of any prior act of bankruptcy by such bankrupt committed, or that he was *insolvent*, or had *stopped payment*: Provided always, that the *issuing* of a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice, if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission.

If therefore the defendant in an action by the assignees prove *payment* to the bankrupt, it will be incumbent on the
* 179 assignees to prove an act of bankruptcy previous to * such payment, and that the defendant understood or knew that the trader had become a bankrupt (*p*).

By the stat. 19 Geo. II. c. 32, s. 1, no real and *bona fide* creditor of any bankrupt, for or in respect of goods really and *bona fide* sold to such bankrupt, or for or in respect of any bills of exchange really and *bona fide* drawn, negotiated, or accepted by such bankrupt, in the usual or ordinary
* 180 course of trade and dealing (*q*), * shall be liable to repay

(*p*) Under the stat. 1 Jac. I. c. 15, s. 14, *supra*, 176.

(*q*) A payment under an arrest of the bankrupt as the acceptor of a bill of exchange, has been held to be within the act (*Cox v. Morgan*, 2 B. & P. 398, Chambre, J. *diss.* See also *Holmes v. Wennington*, 2 B. & P. 399. *n. Ex parte Farr*, 9 Ves. 515). Payments on bills not yet due are not within the act (*semble.*) (*Tamplin v. Digging*, 2 Camp. 312.) Nor on *accommodation* bills (*Holroyd v. Whitehead*, 3 Camp. 530. 2 Camp. 315. *n.* 1 Marsh. 128. 2 H. B. 334, 11 East, 127). Where a voluntary and fraudulent preference is intended, the payment is not protected by the statute; as, where the bankrupt being in prison sent for all his creditors, except one, at whose suit he was in custody, and paid them. *Southey v. Butler*, 3 B. & P. 237.

Where a factor accepted a bill in favour of his principal after a *secret* act of bankruptcy, and *after notice* the factor paid the amount to the holder, it was held that the payment was within the protection of the statute. *Wilkins v. Casey*, 7 T. R. 711. *Coles v. Robins*, 3 Camp. 133.

Where a banker, on whom a bill of exchange had been drawn, requested, when it became due, that it might remain in his hands, and promised to pay interest, and afterwards, upon application by the holder, who had no notice of a previous act of bankruptcy, paid the amount, it was held that the transaction amounted to a loan, and was not within the statute. *Vernon and others v. Hall*, 2 T. R. 648.

Where *A.* having obtained a verdict against *B.*, who afterwards committed a secret act of bankruptcy, instead of entering up judgment and taking out execution, took a bill drawn by *B.* on *C.*, which was paid when due, it was held that the payment was not within the statute. *Pinkerton v. Marshall*, 2 H. Bl. 334.

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to the assignees of such bankrupt's estate any money which, before the suing forth such commission, was really and *bona fide* and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt before such time, as the person receiving the same shall know, understand, or have notice that he is become a bankrupt, or that he is in insolvent circumstances.

V. By stat. 21 Jac. I. c. 19, s. 11, it is enacted, that if any person, at such time (*r*) as he shall become bankrupt, shall by the consent and permission of the owner and proprietary (*s*), have in his possession, order * and disposition, any goods or chattels (*t*) whereof he shall be the *reputed*

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The statute does not extend to a payment by the *debtor* of the bankrupt upon a judgment against him on a foreign attachment, since it mentions payments by the bankrupt only. *Hovil v. Browning*, 7 East, 154.

Where a factor accepted and paid bills on the strength of goods consigned to him by his principal, after a secret act of bankruptcy, and after a commission sold the goods and received the money, it was held that he was not protected either by the stat. 1 Jac. I. c. 15, s. 14, or 19 Geo. II. c. 32, s. 1.

The statute is confined to payments for goods sold, and bills of exchange, and therefore does not extend to a payment for the carriage of goods (*Bradley v. Clarke*, 5 T. R. 197.) A payment on a note given by the bankrupt for a balance of an account consisting *inter alia* of money lent by the payee to the bankrupt, and the receiving half-yearly interest, is not within the statute (*Harwood v. Lomas*, 11 East, 127). And the assignees are entitled to recover the money paid on the note by the bankrupt, after his bankruptcy, to the payee, although the latter had recovered judgment against the bankrupt in an action on the note. *Ibid*.

(*r*) The possession must be at the time of the bankruptcy (15 East, 21); and therefore the statute does not apply where goods, lying at a wharf in the name of the vendor, are sold, and the vendor gives an order to the vendee on the wharfinger to deliver the goods to the vendee, and nine days before the bankruptcy the vendee, knowing the vendor's insolvency, carries the order to the wharfinger, and has the goods transferred into his own name. *Jones v. Dwyer*, 15 East, 21.

(*s*) The preamble of the statute recites, "That it often falls out that many persons before they become bankrupts convey their goods to other men upon good consideration, yet still keep the same, and are reputed the owners thereof, and dispose of the same as their own." The enacting part of the statute extends (notwithstanding the word *convey* in the preamble) to goods in general of other persons of which the bankrupt has possession by consent of the owner. *Mace v. Cadell*, Cowp. 232. *Horne v. Baker*, 9 East, 239.

(*t*) Book-debts, bills of exchange, and choses in action, are within this description (1 Wilson, 260. *Ryall v. Rolle*, 1 Ves. 348. 1 Atk. 165. *Hornblower v. Proud*, 2 B. & A. 327.) So are mortgages and sales upon condition of goods and chattels, as well as absolute sales (*Ibid.*); and so is a mortgage by one partner to another of his moiety of his

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owner, and take upon him the sale, alteration, or disposition as owner, the commissioners shall have power to dispose of and sell the same for the benefit of the creditors seeking relief under the commission, as fully as any other part of the estate of the bankrupt.

The obvious intention of this statute, is to prevent a trader from acquiring a false and delusive credit to the deception of others, by an *apparent* property in goods which do not belong to him.

Whether particular property was in the possession of the bankrupt at the time of his bankruptcy, as the *reputed owner*, is usually a question of fact under the particular circumstances of the case.

Where the assignees bring the action to recover the amount of the goods which the defendant claims as his own property, either by virtue of a sale to him by the bankrupt, or as being originally his own, it is incumbent on the assignees to prove that the goods remained in the possession of the bankrupt, he being still a trader (u) up to the time of the bankruptcy (x), and that he was the *reputed owner*, and appeared to have the order and disposition of the goods; for the words of the statute, “and take upon himself the sale, * alteration, or disposition as owner,” are merely incidental to the reputed ownership (y).

Proof that the former owner of a ship had the possession, order, and disposition of the vessel up to the time of his bankruptcy, is sufficient to vest the property in the assignees, although he has assigned his interest, and the transfer has been duly registered, according to the register acts (z). So in the case of a joint interest in a ship, mortgaged by the bankrupt, where he continues in the management of her, together with the part-owners, and acts as a visible part-owner till he becomes a bankrupt (a).

Where the property consists of household furniture, stock in trade, or utensils in trade, it is sufficient that the bankrupt remained in possession of the house, and carried

stock in trade, if the partner so mortgaging remain in possession as the visible proprietor of the moiety (*Ibid.*) Mortgages of lands and fixtures are not within the statute (*Ryall v. Rolle*, 1 Ves. 348. *Horne v. Baker*, 9 East, 237); neither are vats nor stills, nor other utensils which are fixed to the freehold. *Ibid.*

(u) *Gordon v. East India Company*, 7 T. R. 228.

(x) 15 East, 21.

(y) *P. C. Lingham v. Biggs*, 1 B. & P. 82.

(z) *Hay v. Fairbairn*, 2 B. & A. 193. *Robinson v. M'Donnell*, Sel. N. P. 1142.

(a) *Hall v. Gurney*, Co. B. L. 5th edit. 342.

on the trade as the apparent owner of the stock and utensils, up to the time of the bankruptcy. As, where a creditor took the household furniture, and the articles belonging to a coffee-house, under an execution against *B.*, and then let them to *B.*, who covenanted not to remove them without the owner's consent, and permitted *B.* to remain in possession as before (*b*). So where after the seizure of *B.*'s stock in trade upon a *fi. fa.* in Cumberland, by the trader's shopman, under a warrant on a Saturday, they carried away the key, but opened the shop again on Monday morning, and although *B.* did not interfere, business was carried on, apparently, as usual, and in the evening of the Monday *B.* committed an act of bankruptcy, it was held that the goods passed to the assignees, * notwithstanding the execution, since the possession of the servants was the possession of the master (*c*).

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So where *B.* a brewer, being in partnership with *A.*, mortgaged a moiety of the stock in trade, utensils, debts, &c. to *C.* in trust for *A.*, but continued in possession, and acted as *A.*'s partner till he *B.* became bankrupt; for being in possession, and acting as partner, receiving debts, &c. *B.* was as much the reputed owner as *A.* (*d*). So where *A.* sold a dyer's plant to *B.*, and at the end of a year *B.* covenanted to deliver up the plant, in consideration of *A.*'s cancelling *B.*'s unpaid notes, which he had given to *A.* in payment for the plant; and it was stipulated that *A.* should let the plant to *B.* for a term, with a proviso that *B.* should deliver up the plant, and that *A.* might take possession of it upon the failure in payment of rent. There was a memorandum that *B.* had given possession to *A.* by the delivery of a single winch; *B.* remained in possession till his bankruptcy, and it was held, that the property vested in the assignees (*e*).

A. a trader and an officer in the East India Company's service, assigned his privilege of shipping goods to England to *B.* but (such an assignment being prohibited), the

(*b*) *Lingham v. Biggs*, 1 B. & P. 82. See also *Longman v. Tripp*, 2 N. R. 67, as to the publisher's right to a paper. See *Knowles v. Horsfall*, 3 B. & A. 134; Part IV. 1642, note (*l*). *Secus*, where merely left in vendor's warehouse till they can be conveniently shipped. *Finn v. Matthews*, 1 Atk. 185.

(*c*) Per Lord Ellenborough, C. J. *Jackson v. Irwin*, 2 Camp. 49. And see *Horne v. Baker*, 9 East, 215. *Thackthwaite v. Cock*, 3 Taunt. 487. But see *Caldwell v. Gregory*, 1 Price, 119.

(*d*) *Ryall v. Rolle*, 1 Ves. 348. 1 Wils. 260. 1 Atk. 165. *Tous-saint v. Hartop*, Holt's C. 335.

(*e*) *Bryson v. Wylie*, 1 B. & P. 83, *n*.

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* 184 goods were shipped, entered, warehoused, and sold in *A.*'s name, and the proceeds were carried to his account; but before he received them from the Company he became a bankrupt, it was held that the assignees were entitled to such proceeds (*f*). So where *A.* a distiller, leased to *B.* (his former partner,) and *C.* a distil-house, with the stills, vats, and utensils, * which had before been used by *A.* and *B.*, and after this *B.* and *C.* carried on business as partners, in possession of the premises and utensils, till they became bankrupt; the court were of opinion that the bankrupts had, at the time of the bankruptcy, acquired the reputed ownership of the vats and utensils (which were moveable), and had thereby acquired the real ownership for their creditors (*g*).

Where *A.* who kept a public house, asserted that she was married to *P.*, and entered his name at the Excise Office, with a note in the margin "married," and *P.* afterwards had the license, and continued in possession of the house and goods, till he became a bankrupt, the court held that *A.* could not, after asserting that *P.* was her husband, claim them as her sole property (*h*). So where the trustees for the wife of *B.*, and her children by a former husband, permitted *B.* to remain in possession of the goods, (on condition that he should pay to them certain sums for the use of the children), until the evening before he committed an act of bankruptcy; the case was held to be within the statute (*i*).

Evidence of reputation is admissible to prove the defendant to be the *reputed* owner, where the reputation is supported by facts; but bare reputation, unsupported by facts, although perhaps *admissible*, is *insufficient* evidence to prove an apparent ownership under the statute (*k*).

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ownership.
Answer.

* 185 The presumption arising from the bankrupt's possession of property at the time of the bankruptcy is frequently capable of being answered and explained away by evidence which shows that possession was * given up by the bankrupt, as far as the nature of the case admitted; or that there was not such a permissive possession as is contemplated by the statute. For the *mere possession* of the pro-

(*f*) *Gordon v. The East India Company*, 7 T. R. 228

(*g*) *Horne v. Baker*, 9 East, 215.

(*h*) *Mace v. Cadell*, Cowp. 232.

(*i*) *Darby and others v. Smith*, 8 T. R. 82.

(*k*) *Oliver v. Bartlett*, 1 B. & B. 269. And see *Muller v. Moss*, 1 M. & S. 335. *Lingham v. Biggs*, 1 B. & P. 57. *Horne v. Baker*, 9 East, 241.

perty by the bankrupt is not in itself sufficient to entitle the assignees to claim it for the creditors (*j*).

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Where there is a possession, without any wilful permission on the part of the owner which may delude creditors, the case is not within the statute; as where, *first*, such possession is delivered as the circumstances of the case will permit; so, *secondly*, where the bankrupt has possession as executor (*l*) or administrator; or where the husband has possession of the separate property of the wife (*m*); or has a mere temporary custody of it; or, has the possession for such a purpose, as excludes the presumption of ownership, and consequently where no delusion can arise; as where the bankrupt has possession as factor (*n*), or as bailee, or as a banker for a specific purpose. *Thirdly*, the owner may show that in point of fact the bankrupt was not the reputed owner.

Proof in answer.

1st. Where a ship or cargo is sold whilst the ship is at sea, then, since actual possession cannot be taken before her return, it is sufficient, if in the mean time the grand bill of sale and bill of lading be transferred, since there is no other way of delivering possession (*o*). So where a trader, as a security for money lent, assigned the bills of lading, and policies of insurance of the cargo of a ship at

That actual possession cannot be given.

(*j*) Where the bankrupt is proved to have once been the owner, and to have been in possession at the time of the bankruptcy, the *onus* of proving a change of ownership lies on the party who claims against the assignees. *Lingard v. Messiter*, 1 B. & C. 308; 2 D. & R. 495. Where the change was under a bill of sale to a creditor upon an execution, and the creditor's initials had been put upon the goods, and they had been demised to the bankrupt at a rent under which he had continued in possession, it was held that there was no evidence to go to a Jury of a notorious change of possession. *Ib.*

If a vendee of a ship neglect to take possession after the arrival in an English port, and notice thereof, the property passes to the assignees. *Mair v. Glennie*, 4 M. & S. 240. An alteration in the register is no notice to the world. *Kirkly v. Hodgson*, 1 B. & C. 588. And it gives no validity to a transfer otherwise invalid. *Robinson v. Macdonnell*, 5 M. & S. 236; and *Monkhouse v. Hay*, 4 Moore, 549. And *Hay v. Fairbain*, 2 B. & A. 196. But if a vendee of ship registered in his name take possession before an act of bankruptcy committed by the vendor, the property is in the vendee. *Robinson v. Macdonnell*, 2 B. & A. 134.

(*l*) *Ex parte Marsh*, 1 Atk. 159. 3 P. Wms. 187. n. 3 Burr. 1368.

(*m*) *Jarman v. Woolton*, 3 T. R. 618.

(*n*) *Ex parte Chion*, 3 P. Will. 187, n. Cullen's B. L. 225.

(*o*) *Brown v. Heathcote*, 1 Atk. 160. *Atkinson v. Maling*, 2 T. R. 462. *Lempriere v. Pasley*, 2 T. R. 485. [*Bartlett v. Williams*, 1 Pick. 288. *Badlam v. Tucker & al.* 1 Pick. 398.]

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Proof in answer to reputed ownership.

sea, and the policies were indorsed to the lender, but the bills of lading were not, the trader became bankrupt, and Lord Hardwicke, C. held, that since every thing which could show a right to the cargo had been * delivered over to the defendant, (against whom the assignees had filed a bill) the bankrupt could no longer be said to have the order and disposition of it (*p*). So where a trader, as a security for a debt due to the defendant, agreed to assign the cargo of a ship homeward bound, and to deposit the policy of insurance on the goods with the defendant, and to indorse and deliver the bills of lading to him as soon as they arrived; the policy and letters of advice were accordingly deposited with the defendant, and the bill of lading was indorsed to him as soon as it arrived, but after an act of bankruptcy committed by the trader. The defendant obtained possession of the cargo, and on trover brought by the assignees, the court held that the case of *Brown v. Heathcote* strongly applied; since, although in that case there was an assignment of the bill of lading, and in this only an agreement to assign, this circumstance made no difference, since in both cases the title was merely an equitable one (*q*).

Where the ship was in an Irish port at the time when the owner mortgaged her, and delivered all the deeds, &c. to the mortgagee, and during the space of a month the mortgagee might have taken possession of her in the Irish port, it was held, that the delivery of the muniments constituted a sufficient possession, and that the mortgagee was not bound to take possession of her in a foreign port (*r*).

Where *A.* a trader, deposited with *B.* a bill of sale of a sixteenth part of a ship not at sea, and there was no evidence that the trader had acted as owner after the deposit, Lord Thurlow, C. held, that *B.* was entitled to the produce of the bill of sale against the assignees of *A.*, who had become bankrupt, since in * the case of assignments of *shares* of ships this seemed to be the only way of delivering possession (*s*).

Possession as executor, &c.

2dly. It has been held, that where the bankrupt has possession of the goods as an executor or administrator, the case is not within the statute (*t*); so that where an executor becomes bankrupt, the commissioners cannot seize even

(*p*) *Brown v. Heathcote*, 1 Atk. 160.

(*q*) *Lempriere v. Pasley*, 2 T. R. 485.

(*r*) *Ex parte Batson*, 3 Bro. C. C. 362. See also *Atkinson v. Maling*, 2 T. R. 462.

(*s*) *Ex parte Stadgroom*, 1 Ves. jun. 163. See also *Manton v. Moore*, 7 T. R. 67.

(*t*) *Ex parte Marsh*, 1 Atk. 159.

money which belonged to the testator, if it can be specifically distinguished from the property of the bankrupt himself (*u*). Neither does it extend to a possession by the bankrupt as a trustee for another; as, where a trader bought South Sea stock for *I. S.* in his own name, but entered it in his book as bought for *I. S.*, after which he became bankrupt, it was held that *I. S.* was entitled to the stock (*x*). So where the husband has possession of the separate property of the wife, settled in trustees upon her before marriage (*y*). So where the bankrupt has possession as a mere factor or agent for sale (*z*). So where a carpenter receives * timber to convert into a waggon (*a*); or a tailor cloth to * 188 work up into clothes (*b*). It was agreed between *F.* and *K.*, that *K.* should contract with the commissioners of the Victualling-office to do certain work in his own name; that he should have a guinea per week, and one-fourth of the clear profits, and that *F.* should supply timber for the purpose. Timber was accordingly supplied by *F.*, and was received by the king's officers in the yard where the work was to be done. *F.* was one of *K.*'s sureties, which according to the practice as to government contracts, would not have been allowed, had it been known that he was concerned in the contract. *K.* became bankrupt, and *F.* took possession of the timber; and upon an action brought by

Proof in answer.

(*u*) Per Lord Mansfield, 3 Burr. 1369. 1 Atk. 101. If a person entitled to take out administration neglect to do so, and he becomes bankrupt, the goods pass to the assignees, although he takes out administration after the bankruptcy. *Fox v. Fisher*, 3 B. & A. 135.

(*x*) By Lord Parker, C. *Ex parte Chion*, 3 P. Wms. 187. *n.* And see Lord Mansfield's observation in *Mace v. Cadell*, Cowp. 233.

(*y*) *Jarman v. Woolton*, 3 T. R. 618. But if property be settled on the wife to enable her to carry on a separate trade, and the husband intermeddle, the property will be liable to his debts. (*Ib*). So if the bankrupt have the possession of goods which come to his wife as administratrix, where some of the next of kin are infants, they do not pass to his assignees (*Viner v. Cadell*, 3 Esp. C. 88); but if she takes a beneficial interest in the property, her own share passes to the assignees, who become tenants in common with her in her representative capacity. *Ibid*.

(*z*) Per Ld. King, C. in *Godfrey v. Furzo*, 3 P. Wms. 186. Per Ld. Mansfield, in *Mace v. Cadell*, Cowp. 233. And see the observations of Lawrence, J. in *Horne v. Baker*, 9 East, 243. Goods sent on sale and return are within the statute, if the party retain them after a reasonable time for making his election has expired (*Livesay v. Hood*, 2 Camp. 83. *Gibson v. Bray*, 1 Moore, 519. *Neate v. Ball*, 2 East, 117. *Aliter*, if a reasonable time has not elapsed, as if the goods were not received till the evening before the bankruptcy. 1 Moore, 519.

(*a*) *Collins v. Forbes*, 3 T. R. 316.

(*b*) *Ibid*.

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Proof in answer.

Possession as banker.

the assignees of *F.*, it was held that the case did not fall within the statute, since there was never any sale of the timber to *K.*, nor any general delivery, so as to give him the absolute disposition of it; and the storekeepers would not have permitted *K.* himself to have sold the timber to any other person, since they considered it as delivered solely for the purpose of the contract (*c*).

- So the owner may show, that a banker at the time he became bankrupt had possession of specific money or bills of his in his hands, not upon a general or running account between them, but for some specific purpose to which they had been appropriated. As, where *A.* remitted bills to *B.* a banker, for the express purpose of answering other bills drawn by *A.* on the banker, on a particular account, which latter bills had been dishonoured by the banker, and paid by *A.* before the bankruptcy of *B.* (*d*). Where *A.* transmitted
- * 189 * certain bills of long dates to *B.* a banker, requesting permission to draw bills of shorter dates without renewals, and sent the long bills indorsed to *B.* in the letter of request, and *B.* answered, that agreeable to *A.*'s request he had discounted the bills, and then specified the amount to be drawn for, it was held, that the transaction did not amount to a sale or exchange of bills upon discount, but to a deposit of the long bills, on condition of being allowed to draw shorter bills, and therefore, that *B.* having become bankrupt, whereby *A.*'s bills were dishonoured, the long bills which remained in *B.*'s possession at the time of the bankruptcy did not pass to the assignees (*e*). So where *A.* had transmitted to *B.* his banker, bills to answer outstanding acceptances by *B.* on account of *A.*, upon an agreement by *A.* to make remittances to answer such acceptances when due; and the acceptances were not paid by *B.*, but by *A.* after the bankruptcy of *B.*; it was held, that the bills remitted for the purpose of answering these acceptances were in the nature of goods in the possession of a factor, and that they belonged to *A.*, subject to *B.*'s lien for the balance due at the time of the bankruptcy (*f*); and that having been deposited by *B.* with another

(*c*) *Collins v. Forbes*, 3 T. R. 316. See the observations of Lawrence, J. in *Gordon v. East India Company* (7 T. R. 237), that the court proceeded on the ground that the bankrupt had possession of the property for a *special purpose* only. [See also observations of Lord Ellenborough, 9 East, 228.]

(*d*) *Ex parte Dumas*, 2 Ves. 582. 1 Atk. 232.

(*e*) *Parke v. Eliason*, 1 East, 544. *Collins v. Martin*, 1 B. & P. 649.

(*f*) *Zinck v. Walker*, 2 Bl. R. 1154.

banker, who had set them short in the bankrupt's book, they were the same as if still in possession of the bankrupt.

A. and *B.* agreed that *A.* should sell to *B.* light guineas from time to time, and that *A.* should draw upon *B.* from time to time, for the money due upon such sales; and that *B.* should accept other bills drawn by *A.* for his own convenience, for which *A.* was to remit value. *B.* being under acceptances to a large amount became bankrupt, and *A.* being ignorant of the bankruptcy, sent light gold and bills to enable * *B.* to discharge such acceptances; and it was held, that *A.* who had since paid *B.*'s acceptances, was entitled to the gold and bills so sent against the assignees (*g*). Proof in answer. * 190

A. paid bills into his bankers hands in the country, who credited their customer for the amount of such bills, as cash, paying interest. The bankers became bankrupt before the bills were due, and the balance of *A.*'s cash account, independently of the bills, was then in his favour, and it was held, that he was entitled to recover from the assignees the money which they had received on these bills, for every person who places bills not due in the hands of his banker, places them as in the hands of agents to obtain money for them when due (*h*).

A. B. C. & D. being partners as brokers at Liverpool, and *C. & D.* being partners as merchants in London, *J. S.* having accepted bills payable at the house of *C. & D.* employed *A. B. C. & D.* to get them paid, and agreed to deposit good bills with them, indorsed by him, to enable them so to do. *A. B. C. & D.* debited *J. S.* in account for his acceptances, and credited him with all the bills which he had deposited; some of the bills so deposited were remitted by *A. B. C. & D.* to *C. & D.* upon the general account between the two houses; and before any of the acceptances of *J. S.* became due, both houses failed, and *J. S.* was obliged to pay all his acceptances; and it was held, that the assignees of *C.* and *D.* were entitled to retain against *J. S.* all the bills which had been remitted by *A. B. C.* and *D.*, also, that it made no diffe-

(*g*) *Tooke v. Hollingworth*, 5 T. R. 215, affirmed in the Excheq. Cham. 2 H. B. 501.

(*h*) *Giles v. Perkins*, 9 East, 12. See also *Thompson v. Giles*, 2 B. & C. 422. An entry of the bills in the bankers books is not sufficient to convert the property. *Ib.* and *Giles v. Perkins*, 9 East, 12; and *Hughes v. Spooner*, cited 2 B. & C. 425.

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Depositions.

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ble, since although the bankruptcy of *A.* was a severance of the joint-tenancy, yet under a joint commission they could not sue for the separate property of one (*r*).

Where on default of notice the proceedings are read in evidence, the defendant is still at liberty to adduce evidence to disprove the depositions, and impeach the bankruptcy (*s*). Formerly a defendant might disprove the title of the assignees by proof of an act of bankruptcy committed anterior to the petitioning creditor's debt, and of a sufficient debt to have supported a commission (*t*), although neither the bankrupt himself, nor any one claiming by assignment from him, could have sustained such an objection (*u*). But now, by the stat. 46 Geo. III. c. 135, s. 5, "No commission * of bankrupt shall be avoided by reason of an act of bankruptcy having been committed by the person against whom such commission shall have been issued, if such petitioning creditor had not any notice of such act of bankruptcy, at the time when the debt was contracted" (*x*).

Payment of money to the petitioning creditor after the suing out of the commission renders the commission supersedable, but not *ipso facto* void (*y*). The defendant may impeach the petitioning creditor's debt, as by showing that it was due to the petitioning creditor and another,

(*r*) *Hogg v. Bridges*, 2 Moore, 122. 8 Taunt. 200. See *Stonehouse* and another *v. De Silva*, 3 Camp. 399; and 2 Starkie's C. 17, *Harvey & al. v. Morgan*.

(*s*) *Mills v. Bennett*, 2 M. & S. 556. *Ellis v. Shirley*, 3 Camp. 424. Contra, *Humphries v. Coggan*, 1 Rose, 226.

(*t*) *R. v. Bullock*, 1 Taunt. 72. 88. 14 Ves. 67. 452. *Beardmore v. Shaw*, 1 N. R. 263. But an act of bankruptcy alone was insufficient. *Parker v. Manning*, cited 2 Esp. C. 598. 4 Esp. C. 194. 9 East, 21.

(*u*) *Mercer v. Wise*, 3 Esp. 219. 1 Taunt. 80. 86. 94. *Donnovan v. Duff*, 9 East, 24. See *Doe v. Boulcot*, 2 Esp. C. 595, Eyre, C. J. *Bryant v. Withers*, 2 M. & S. 123.

(*x*) It is still necessary to prove the existence of a petitioning creditor's debt at the time of the act of bankruptcy (*Moss v. Smith*, 1 Camp. 489). The assignees may avoid a demise by the bankrupt of premises, by proof of an act of bankruptcy previous to that on which the commission is founded, coupled with a sufficient petitioning creditor's debt (*Doe v. Boulcot*, 2 Esp. 595). The debt of a creditor who has joined in a petition to supersede a former commission, and has proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the second commission is founded, may be set up to defeat the second commission by a defendant, in an action by the assignees under that commission. *Beardmore v. Shaw*, 1 N. R. 263.

(*y*) *Garratt v. Sir Theophilus Biddulph*, 4 Esp. C. 104.

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jointly, the latter not concurring in the petition (z); or that the petitioning creditors could not have sued upon the bill accepted by the trader upon which the debt is claimed, one of them having engaged to provide for the bill when due (a); that one of the petitioning creditors is resident and carrying on trade in an enemy's country (b).

Proofs to impeach the commission.

The petitioning creditor cannot in an action against him by the assignees dispute the amount of the petitioning * creditor's debt (c). But it seems that another defendant may show that the debt was merely colourable and collusive, although the bankrupt himself might have been estopped by the security which he had given from disputing it (d).

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It seems that a defendant who was not privy to the transaction may show that the act of bankruptcy which is relied upon was a concerted one (e). But neither the bankrupt, nor any one privy to the concert, can insist upon such an objection (f).

Concert.

2dly. The defendant may show that in point of law the right of action did not pass to the assignees. (j). Whether

To impeach the cause of action.

(z) *Brickland v. Newsom*, 1 Camp. 474. 1 Taunt. 477. S. C.

(a) *Richmond v. Heapy*, 1 Starkie's C. 102.

(b) *McConnell v. Hector*, 3 B. & P. 113. So, *semble*, that one of them is an infant. *Ex parte Morton*, 1 Buck's B. C. 42. *Ex parte Barrow*, 3 Ves. 554.

(c) *Harmer v. Davis*, 1 Moore, 300. 7 Taunt. 577. S. C.

(d) See Christian's B. L. 442, 2d edit.

(e) See *Ld. Mansfield's* observations, in *Hooper v. Smith*, 1 Bl. Rep. 441. *Rumford v. Baron*, 2 T. R. 595, n. *Stewart v. Richman*, 1 Esp. C. 108. *Field v. Bellamy*, B. N. P. 39. *Cowley v. Hopkins*, Co. B. L. 84. 95. *Ex parte Bourne*, 16 Ves. 145. *Ex parte Edmundson*, 7 Ves. 303. But see *Bromley v. Munde*, B. N. P. 39. *Ex parte Milner*, 1 Buck's B. C. 104. In an action by the assignees of a bankrupt, declarations by the bankrupt before his bankruptcy, with a view to a fraudulent commission, are admissible in evidence to show collusion between the bankrupt and the petitioning creditor, *Thomson v. Brydges*, 2 Moore, 376.

(f) *Roberts and others v. Teasdale*, Peake C. 27. B. N. P. 39, 40. *Cowley v. Hopkins*, Co. B. L. 84, 95. *Ex parte Bourne*, 16 Ves. 145. See also *Wilson v. Poulter*, 2 Str. 859. *Billon v. Hyde & Mitchell*, 1 Atk. 126. *Tappenden v. Burgess*, 4 East, 235. *Vide supra*, *Fraudulent Conveyance*, p. 153, 4. See also *Moore v. Barthrop*, 1 B. & C. 5. 2 D. & R. 25.

(j) A draft is intrusted to a broker to buy Exchequer bills; the broker receives the money and misapplies it by purchasing American stock and bullion, and absconds, but is apprehended. The principal who receives the American stock and bullion is not amenable to the assignees under a commission against the broker, on an act of bankruptcy committed on the day on which he misapplied

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a particular interest does or does not pass to the assignees, is of course a pure question of law, but it is incumbent on the defendant to give in evidence such facts as raise the question of law, where it does not arise from the plaintiff's proofs (g).

the money. *Taylor v. Plumer*, 3 M. & S. 563. In general, the product of a substitute for the original follows the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case where the subject is turned into money, and mixed and confounded in a general mass of the same description. Per Lord Ellenborough, *Ib.* See *Scott v. Surman*, Willes, 400. *Whitcomb v. Jacob*, Salk. 160. *Copeman v. Gallant*, 1 P. Williams, 320.

(g) Bills of exchange obtained by false pretences do not pass (*Gladstone v. Hadwen*, 1 M. & S. 517); nor trust property (1) (*Webster v. Scales*, 25 G. III. B. R. *Winch v. Keeley*, 1 T. R. 619); nor the property of the bankrupt's wife to her separate use (*Vandernanker v. Desborough*, 2 Vernon, 96.) *Aliter*, where stock stands in the name of a married woman (*Pringle v. Hodgson*, 3 Ves. 617); and the wife can have no assistance in equity where there is no trust created for her benefit (*Ibid*; and see Christian's B. L. 483, 2d edit.) The assignment passes future personal property, (*Kitchen v. Bartsch*, 7 East, 53); but there must be a fresh assignment of real property (*Ex parte Proudfoot*, 1 Atk. 253). The assignment passes contingent interest (*Higden v. Williamson*, 3 P. Wms. 132;) but not a possibility of taking by descent as heir (*Moth v. Frome*, Amb. 394. *Carleton v. Leighton*, 3 Mer. 667). It has been a common practice for the commissioners to convey copyhold estates immediately to the purchasers (see Christian's B. L. 472, 2d edit.); but this seems to be incompatible with the prescriptions of the stat. 13 Eliz. c. 7, s. 30, (and see *Drury v. Man*, 1 Atk. 95). All saleable offices pass by assignment (1 Atk. 210); *aliter*, of offices which concern the administration of justice (5 & 6 Ed. VI. c. 16. See *Ex parte Butler*, 1 Atk. 210. 215. Amb. 73. 89. 112. Cooke's B. L. 283.) So an officer's pay does not pass (*Lidderdale v. Duke of Montrose*, 4 T. R. 248). An advowson passes, but the bankrupt must present, if a lapse occur before conveyance to a purchaser (see *Charman v. Charman*, 14 Ves. 580). The assignment passes the bankrupt's right to recover what he has paid as a gaming debt (*Brandon v. Pate*, 2 H. B. 308). A lease, notwithstanding a covenant not to assign without consent. *Philpot v. Horne*, 2 Atk. 219. Amb. 480. *Doe v. Carter*, 8 T. R. 57. *Aliter*, where there is a proviso for re-entry in case of the lessee's bankruptcy (*Roe v. Galliers*, 2 T. R. 133). An annuity demised to the bankrupt, and payable to him only, ceases upon the assignment (*Dommelt v. Bedford*, 6 T. R. 684. 3 Ves. 150). A debt due to the wife *dum sola* passes (*Miles v. Williams*, 1 P. Wms. 249); so does a debt on mortgage (*Bosvil v. Brander*, 1 P. Wms. 459); but the wife's right of survivorship is good against the

(1) [A bankrupt's certificate does not discharge personal covenants in a trust deed, intended only to protect the trust estate, and which admitted of no satisfaction under the commission. *Murray v. De Rottenham*, 6 Johns. Ch. Rep. 63.

* The assignees by bringing an action in the form *ex contractu*, where it might have been laid in *tort*, affirm the act of the bankrupt, and the defendant is entitled to the benefit of a set-off (*h*). For the assignees cannot affirm the same transaction in part, and disaffirm it * for the rest. And therefore, where the bankrupt, after a secret act of bankruptcy, had transactions with the defendants, and the assignees brought an action of *assumpsit* to recover what the bankrupt had paid Lord Hardwicke, C. held, that the defendants were entitled to set off money which they had paid for the bankrupt (*i*); for by bringing an action of *assumpsit* the assignees had elected to consider the bankrupt as their factor, and affirmed his contract, and having done so, must take him as their factor in all things done fairly and without deceit.

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Upon an action by the assignees, the defendant, under the stat. 5 Geo. II. c. 32, s. 28, where there have been mutual credits between the parties, is entitled to set off a debt due from the bankrupt to him before the bankruptcy, without giving any notice of set-off; and he may either plead the set-off, or give it in evidence under the general issue (*k*).

By the stat. 46 Geo. III. c. 135, s. 3, if it shall appear that there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, one debt or demand may be set off against the other, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit was given to, or the debt was contracted by, such bankrupt,

assignees, if the husband dies before they obtain possession (*Mitford v. Mitford*, 9 Ves. 87). Goods delivered to the bankrupt on a contract of sale pass to the assignees, although the bankrupt intended to defraud the vendor (*Milward v. Forbes*, 4 Esp. C. 171). So does the interest of a tenant for life in his redemption of the land-tax (*Emley v. Grey*, 3 Mer. App. 702). Money advanced to the bankrupt in prison (the act of bankruptcy) for the special purpose of settling with his creditors, which object fails, may be repaid by the bankrupt to the party advancing the money, and does not pass to the assignees. *Toovey v. Milne*, 2 B. & A. 683.

(*h*) *Smith Hodson*, 4 T. R. 211.

(*i*) *Billon v. Hyde & Mitchell*, 1 Atk. 120.

(*k*) *Grove v. Dubois*, 1 T. R. 112. *Ryall v. Larkin*, 1 Wils. 155. [See Cowp. 135. 4 Taunt. 537. 7 Taunt. 478. 558.] *Vide etiam*, *Edwards v. Newman*, 1 B. & C. 418, as to mutual securities held by country bankers. And see as to the advance of money on the strength of consignments, *Easum v. Cato*, 5 B. & A. 861. *Ex parte Deeze*, 1 Atk. 228. As to mutual accounts between an insurance broker and underwriter, see 19 G. 2. c. 32. *Graham v. Russel*, 5 M. & S. 498.

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in like manner as if no such prior act of bankruptcy had been committed, provided such credit was given to the bankrupt two calendar months before the date and suing forth of such commission; and provided the person claiming the benefit of such set-off had not, at the time of giving such credit, notice of any prior act of bankruptcy, or that such bankrupt was insolvent, or had stopped payment."

- * 198 * The defendant must show that the debt which he proposes to set off accrued before the act of bankruptcy (*l*), and he cannot set off cash-notes payable to *J. S.* or bearer, although they are dated before the bankruptcy, without showing that they came to his hands before the bankruptcy (*m*). So where the defendant insists on acceptances of the bankrupt in his hands, by way of set-off to an action by the assignees, on his own acceptance, he must shew either that his obligation to pay the bills subsisted before the bankruptcy, or that the bills originated in mutual credit (*n*).

Where *B.* agreed to indemnify *A.* his surety, by allowing him to retain out of any debt which he should owe to *B.*, in respect of mutual dealings in trade, as much as he should pay on the bond, and *B.* sold goods to *A.*, and after *B.*'s bankruptcy *A.* paid more than the price of the goods on the bond, it was held that the assignees could not recover for the goods, there being nothing due to the bankrupt's estate on the original contract (*o*).

- * 199 * Where *B.* a broker, was intrusted by *A.* a merchant, with policies on goods, effected by *B.* for *A.*; and after *A.*'s bankruptcy, *B.* received for losses under such policies; and *A.* had before his bankruptcy employed *B.* to sell goods for him as a broker, and *B.* had advanced money to *A.* upon a pledge of such goods, and upon *A.*'s general credit, it was held that this was a mutual credit, and that *B.* might retain the sum received for the loss in liquidation

(*l*) *Marsh v. Chambers*, Str. 1234.

(*m*) *Dickson v. Evans*, 6 T. R. 57. Lawrence, J. observed, that if the notes had been payable to the defendant himself, he should have thought it reasonable evidence that they came into his hands at the time they bore date.

(*n*) *Ouchterlony v. Easterby*, 4 Taunt. 888. And see *Sheldon v. Rothschild*, 2 Moore, 43. The bankrupt accepted a bill for 488*l.* for the accommodation of *A.*, but becoming indebted to *A.* for part, drew a bill on *A.* for the balance, and became bankrupt. The latter bill was accepted and paid by *A.* without knowledge of the intervening bankruptcy; and it was held to be a case of mutual credit, although the principal sum was not due at the time of the bankruptcy; it was also held that an action for money had and received did not lie against the purchaser of the bill to whom *A.* had paid the amount.

(*o*) *Dobson v. Lockhart*, 5 T. R. 133.

of his advances, and of the money due for premiums (p). The defendant having accepted bills for the accommodation of a trader, received money from him after an act of bankruptcy, but before the commission, to take up the bills which became due after the commission, and were then paid by the defendant, held that the defendant was bound to refund; since the statute is confined to mutual debts, at any time before such person became bankrupt, it was not the money of the bankrupt, but of the assignees (q). It is not sufficient for the defendant to show that the subject of his set-off was allowed as a debt by the commissioners (r).

Set-off.

A discharge by one assignee, on receiving monies due to the estate, will bind the rest (s); but a discharge by one assignee will not be effectual where the others have expressly dissented (t). So a release executed by one assignee, in the presence of another, will bind * both (u): but if the co-assignee be absent, an express authority by him under seal must be proved (x).

Discharge.

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By the stat. 1 Jac. I. c. 15, s. 16, commissioners and others may, in all cases, justify what they have done under a commission of bankruptcy, under the plea of the general issue. In default of notice, the proceedings under the commission will, as has been seen, be evidence, although others are made co-defendants with them (y). Where they authorize the bankrupt to carry on the business for the benefit of creditors, they are liable for goods supplied to him, although ordered in his own name (z), and to pay him for his trouble. Where they enter and keep possession of the premises, although for the purpose of disposing of the bankrupt's estate, they become liable on the covenants (a).

Defence by assignees,

(p) *Olive v. Smith*, 5 Taunt. 56. And see *Arbouin v. Tritton*, Holt's N. P. C. 408.

(q) *Tamplin v. Diggins*, 2 Camp. 312.

(r) *Pirie v. Mennett*, 3 Camp. 170.

(s) *Smith v. Jameson*, 1 Esp. C. 114. *Contra*, *Carr v. Read*, 3 Atk. 695.

(t) *Bristow and others v. Eastman*, 1 Esp. C. 172, where one assignee had taken 20l. in discharge of various sums embezzled by the defendant against the consent of a co-assignee.

(u) *Williams v. Walsby*, 4 Esp. C. 220. *Ld. Lovelace's case*, W. Jones, 268. *Ball v. Dunsterville*, 4 T. R. 313.

(x) 4 T. R. 313. *Harrison v. Jackson*, 7 T. R. 207.

(y) *Supra*, p. 165.

(z) *Kinder v. Howarth*, 2 Starkie's C. 354.

(a) In order to protect themselves, they should enter with a protest, that it is not for the purpose of possessing themselves of the premises as assignees. *Hanson v. Stevenson*, 1 B. & A. 303. See *Turner v. Richardson*, 7 East, 335. *Wheeler v. Bramah*, 3 Camp. 340.

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Actions by
bankrupt.

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Where a bankrupt had a lease of premises, and also a reversionary interest in them, and the assignees executed an assignment of all the bankrupt's estate and reversionary interest, it was held that they must be taken to have assigned the lease, and consequently to have accepted it (*b*).

VII. It is no defence, that the debtor has notice of the insolvency of the plaintiff, and that he may be afterwards called upon by the assignees to pay the debt; for payments enforced by coercion of law are valid against the assignees (*c*).

In general, it seems to be no * defence to prove that the plaintiff is an uncertificated bankrupt, for a cause of action, as goods sold and delivered (*d*); or money lent (*e*); or a contract for the delivery of goods, subsequent to the bankruptcy (*f*), unless the assignees interpose. He may maintain trover for goods acquired by him after the bankruptcy, against all but his assignees (*g*).

Where the bankrupt was tenant from year to year, and a trespass was committed prior to his bankruptcy, it was held that he might maintain an action of trespass subsequently to his bankruptcy (*h*).

Where a bankrupt was compelled, after his bankruptcy, to pay the amount of his acceptances, which he had lent to the defendant before his bankruptcy, it was held that he might maintain an action for money paid to the defendant's use, notwithstanding his own bankruptcy and certificate (*i*).

(*b*) *Page v. Godden*, 2 Starkie's C. 209. See tit. *Covenant*.

(*c*) *Prickett v. Down*, 3 Camp. 131. 14 Ves. 557. Where a commission is superseded, all acts done under it are void, and an action lies against the assignees for taking the goods. *Ex parte King*, 2 Ves. J. 40. *Perkins v. Proctor*, 2 Wills. 382. Mont. 613. And the titles of purchasers are defeated. *Ib*.

(*d*) *Foster v. Allanson*, 2 T. R. 479. *Silk v. Osborn*, 1 Esp. C. 140. *Chippindale v. Tomlinson*, Co. B. L. 446. *Coles v. Barrow*, 4 Taunt. 757.

(*e*) *Evans v. Brown*, 1 Esp. C. 170. But see *Kitchen v. Bartsch*, 7 East, 53.

(*f*) *Pebbenning v. Roebuck*, Holt's C. 172.

(*g*) *Webb v. Fox*, 7 T. R. 391. *Fowler v. Down*, 1 B. & P. 44. See also *Drayton v. Dale*, 2 B. & C. 293, as to his right to transfer a note made payable to him since his bankruptcy. Also *Ashley v. Kell*, Stra. 1207. Or where he is but a trustee for another; *Fowler v. Down*, 1 B. & P. 44. *Coles v. Barrow*, 7 East, 53.

(*h*) *Clark v. Calvert*, 3 Moore, 96; 8 Taunt. 742. S. C., and *qu.* whether the assignees could have maintained the action. See *Webb v. Fox*, 7 T. R. 391. *Fowler v. Down*, 1 B. & P. 44. *Smith v. Eustace*, 2 H. B. 444. *Cumming v. Roebuck*, 1 Holt's C. 172.

(*i*) *Snaith v. Gale*, 7 T. R. 364.

Evidence that the commissioners made out their warrant of commitment without showing any actual restraint, in consequence of such warrant, the party being previously, and still remaining, in custody, for another cause, is not sufficient to support an action of imprisonment against them (*k*).

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Proofs in actions by bankrupt.

Where the action is brought by the bankrupt to try the question of bankruptcy, the defendants must either * prove the different steps of bankruptcy, or some direct or collateral admission by the plaintiff of his bankruptcy; as, that he obtained his discharge as a bankrupt under a Judge's order (*m*), or solicited votes for the choice of assignees. Proof that he surrendered is insufficient, since the surrender is compulsory (*n*). If no notice has been given to dispute the bankruptcy, the proceedings will be evidence under the statute, although other defendants be joined with the assignees (*o*).

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VIII. By the stat. 5 Geo. II. c. 30, s. 7, "If any bankrupt is afterwards impleaded for any debt due before such time as he became a bankrupt, he may plead in general, that the cause of such action or suit accrued before such time as he became a bankrupt, and may give the special matter in evidence, and the certificate and allowance thereof shall be sufficient evidence of the trading bankruptcy, commission, and other matters precedent to such certificate, and a verdict shall thereupon be given for the defendant, unless the plaintiff can prove the certificate obtained unfairly and by fraud, or can make appear any concealment by the bankrupt to the value of 10*l*."

Actions against a bankrupt. Plea of certificate.

A certificate obtained after the commencement of the action is not evidence under the general issue, since it operates merely as a special discharge under the statute, and therefore must be made available, as the statute directs (*p*); but if the defendant plead such certificate it will be evidence (*q*), although obtained after the commencement of the action.

The effect of the certificate in evidence will be to bar all demands which were due at the time of the act * of bank-

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(*k*) *Crowley v. Impey*, 2 Starkie's C. 261.

(*m*) *Vide supra*, Vol. II. p. 33.

(*n*) *Ibid*.

(*o*) *Supra*, p. 165.

(*p*) *Gowland v. Warren*, 1 Camp. 363. *Stedman v. Martinnant*, 12 East, 664. *Joseph v. Orme*, 2 N. R. 180.

(*q*) *Harris v. James*, 9 East, 82.

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ruptcy, and which could have been proved under the commission (r) (1)

Where a verdict is obtained against the bankrupt in an action for damages, before an act of bankruptcy, but judgment is not signed till after, the debt is not barred by the certificate (s). If an action be commenced against a bankrupt after the bankruptcy, for a debt due before, and after a verdict for the plaintiff the bankrupt obtain his certificate, the costs of the action, as well as the debt, are provable under the commission (t), for the costs bear relation to the original debt (u).

(r) *Bamford v. Burrell*, 2 B. & P. 11. Debts provable under the commission, and debts discharged by the certificate, are convertible terms; and see *Goddard v. Vanderheyden*, 2 B. & P. 8, n. A debt is not discharged which accrued after the bankruptcy, but before the commission. *Ibid.* The proving a debt under the commission is no defence to an action at law for the same debt; and the election of the creditor under the statute 49 G. 3, c. 121, s. 14, is confined to the debt actually proved, and does not extend to distinct debts, though *ejusdem generis*, and due at the same time. *Harley v. Greenwood*, 5 B. & A. 95. *Watson v. Medex*, 1 B. & A. 121.

(s) *Buss v. Gilbert*, 2 M. & S. 70.

(t) *Willett v. Pringle*, 2 N. R. 190. See also *Scott v. Ambrose*, 3 M. & S. 326.

(u) Upon the question whether a debt is barred by a certificate, see *Parslow v. Dearlove*, 5 Esp. C. 78. 4 East, 438. 1 Camp. 428. 6 Esp. C. 98. 4 Taunt. 90. 2 M. & S. 551. For cases of mutual acceptances and exchanges of securities (*Rolfe v. Caslon*, 2 H. B. 570. *Sarratt v. Austin*, 4 Taunt. 200. *Buckler v. Buttivant*, 3 East, 72. *Houle v. Baxter*, 3 East, 177. *Forster v. Surtees*, 12 East, 605. *Cowley v. Dunlop*, 7 T. R. 565). Of sureties (*Martin v. Court*, 2 T. R. 640. *Brooks v. Lloyd*, 1 T. R. 17. *Toussaint v. Martinnant*, 2 T. R. 100. *Paul v. Jones*, 1 T. R. 599. *Hodgson v. Bell*, 7 T. R. 97. *Stedman v. Martinnant*, 13 East, 427). Unliquidated damages (*Hammond v. Toulmin*, 7 T. R. 612. *Overseers of St. Martin v. Warren*, 1 B. & A. 491. 3 Wils. 270. 6 East, 110). Covenant for rent (*Auriol v. Mills*, 1 H. B. 433. 4 T. R. 94. And see *Hornby v. Houlditch*, cited 1 T. R. 92, 93). Debt for rent (*Wadham v. Marlowe*, 1 H. B. 437. 1 T. R. 91. *Gill v. Scrivens*, 7 T. R. 27). In case of a *cognovit* given (*Wyborne v. Ross*, 2 Taunt. 68). In cases of tort (*Parker v. Norton*, 6 T. R. 695). Of verdicts obtained before the bankruptcy (*Buss v. Gilbert*, 2 M. & S. 70). Bills of exchange (*Howis v. Wiggins*, 4 T. R. 714. *Brooks v. Rogers*, 1 H. B. 640. *Joseph v. Orme*, 2 N. R. 180. *Starey v. Barnes*, 7 East, 435. *Pottet v. Brown*, 5 East, 124. Stat. 7 Geo. I. c. 31). Of a bond given after bankruptcy to secure a previous debt. *Birch v. Sharland*, 1 T. R. 715; and see the stat. 49 Geo. III. c. 121; sect. 9, as to debts which become due after bankruptcy, the credit having been given before. *Vide etiam*, *Scott v. Ambrose*, 3 M. & S. 326; and further, as to costs being a mere accessory to the original debt, 5 B. & A. 453. In *Jame-*
son

(1) [See Post. 206, note (1).]

* Where a bankrupt acceptor pleaded his certificate, and it appeared that the commission was sued out after the day of the date of the bill, but before it became due, it was held to be incumbent on the plaintiff, an indorsee, to show that an act of bankruptcy was committed before the date of the bill (x). But an antecedent act of bankruptcy may in such case be proved by the proceedings under the commission, stating a previous act of bankruptcy (y).

If *B.* plead his bankruptcy and certificate, and prove a commission against *A.*, and a certificate under it, he may prove that he was formerly known by the name of *A.*, and that the commission was issued against him, although at the time of the trial he was known by the name of *B.* only (z).

If upon the trial it appear that the bankruptcy was subsequent to the commencement of the action, the plea will not be available (a). (1)

If a surety for the bankrupt, at the time of the act of bankruptcy, be compelled to pay money as such surety, after the act of bankruptcy, by the stat. 49 Geo. III. c. 121,

son v. Campbell, 5 B. & A. 250, it was held, that although a right of action on a bill, and the costs of the action, were discharged by a commission and certificate, yet that the bond of the defendant to secure the payment of the damages and costs under the statute 4 G. 3, c. 33, s. 1; given after the bankruptcy, but before the certificate was not discharged.

Vide etiam, *Ex parte Douthat*, 4 B. & A. 671. *Macarty v. Barlow*, Str. 949. As to Bonds, st. 7 G. 1, c. 31. *Callowell v. Clutterbuck*, cited, 2 Str. 867. *Ex parte Barber*, 9 Ves. jun. 110. *Cotterell v. Hooke*, Doug. 97. *Ex parte Granger*, 10 Ves. jun. 351. *Cockerill v. Ouston*, 1 Burr. 436. *Boutflower v. Coates*, Cowp. 25. *Dimsdale v. Eames*, 2 B. & A. 8.

An Irish certificate does not protect the defendant against a demand for money paid by the plaintiff on bills accepted by him for the defendant in England. *Lewis v. Owen*, 4 B. & A. 654.

(x) *Pearson v. Fletcher*, 5 Esp. C. 90. And see *Macartney v. Barrow*, where the Court said they would not intend that the defendant was a bankrupt before the suing out of the commission, 7 East, 437, n.

(y) *Ibid.*

(z) *Stevens v. Elisee*, 3 Camp. 256.

(a) *Tower v. Cameron*, 6 East, 413. For by the stat. 5 Geo. II. c. 30, s. 7, the plea is given in case any bankrupt who has conformed to the law shall afterwards be arrested or impleaded for any debt due before such time as he became a bankrupt.

(1) [See *Sparhawk & al. v. Broome*, 6 Binney, 256. *Austin & al. v. Slough*, 1 Yeates, 524. 2 ib. 15. S. C. *Pease v. Folger*, 14 Mass. Rep. 264. *Tappan v. Poor & al.* 15 Mass. Rep. 419.]

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“he is entitled to a dividend under the commission, unless he had notice when he became surety, of the bankruptcy or insolvency of the trader of which the issuing a commission, although afterwards superseded, is to be deemed notice.”

* The plaintiff accepted a bill for the accommodation of the defendant, who became bankrupt before the bill was due, and a commission of bankrupt was issued, and afterwards superseded; the plaintiff afterwards accepted another bill to take up the former dishonoured bill, and afterwards an effectual commission was sued out on the former act of bankruptcy, under which the bankrupt obtained his certificate, and the plaintiff afterwards paid the second bill; it was held, that the payment by the plaintiff was, in effect, as surety for the defendant upon the first bill, and therefore within the above statute; and that the case was not within the proviso as to notice, since the suretyship commenced before the issuing of the commission, which was afterwards superseded (b).

Under a joint commission.

A certificate under a joint commission will be evidence in bar of a separate debt (c), and *vice versa*, a certificate under a separate commission in bar of a joint debt (d).

Unliquidated damages.

The certificate is no bar where the plaintiff's claim rests in unliquidated damages, as in an action of trespass or trover, although the conversion was before the bankruptcy (e). (1)

In *assumpsit*, on a promise to pay a certain sum weekly for the support of an illegitimate child, which the plaintiff had by the defendant, upon plea of a certificate, it was held that the defendant was liable for the arrears which had accrued since the bankruptcy (f).

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Foreign certificate.

* The defendant in an action of *assumpsit* may prove that he obtained his certificate in the country, where the debt was contracted, and that by the law of that country the debt was discharged (g). Where the defendant in

(b) *Stedman v. Martinnant*, 13 East, 427.

(c) *Horsey's case*, 3 P. Wms. 23. *Howard v. Poole*, Str. 995. 1157.

(d) *Ex parte Yale*, 3 P. Wms. 24, n. But such discharge is personal, and will not relieve the joint-debtor from his liability. See 10 Ann. c. 15, s. 3.

(e) *Parker v. Norton*, 6 T. R. 695.

(f) Per Lord Ellenborough, *Millen v. Whittenbury*, 1 Camp. 428.

(g) *Hunter v. Potts*, 4 T. R. 182. *Ballantine v. Golding*, Co. B. L. 499, 5th edit.

(1) [*Dusar v. Murgatroyd*, Circuit Court, April 1803, Wharton's Digest, 76. acc.]

America, gave to the plaintiff also residing there, a bill of exchange on England, which was dishonoured for non-acceptance, and the defendant afterwards, and whilst he resided abroad, became a bankrupt, and obtained his certificate, such certificate was held to be a bar to an action here on the bill; for the bill having been dishonoured here, the implied promise to pay it arose in America, by the law of which country the defendant had been discharged (*h*); such certificate is no bar where the debt is contracted in this country (*i*). (1)

Where the bankrupt is entitled to any lease, or agreement for a lease, and the assignees accept the same as part of the bankrupt's estate, by the stat. 49 Geo. III. c. 121, s. 19. (*j*) "the bankrupt shall not be liable to pay the rent

Acceptance of
lease by as-
signees.

(*h*) *Potter v. Brown*, 5 East, 124. It seems that a certificate under a bankruptcy in England is so far a judgment in respect of foreign states, that it may be pleaded in bar to the action of foreign creditors. *In re Odwin v. Forbes*, 1 Buck's B. C. 57; in the Cock-pit. And see *In re Stein & Co.* 1 Rose's B. C. 402.

(*i*) *Smith v. Buchanan*, 1 East, 6.

(*j*) This section is confined to the lessor and lessee, and does not extend to a lessee and his assignees of a lease. *Young v. Taylor*, 2 Moore, 236. 8 Taunt. 315. *Taylor v. Young*, in error, 3 B. & A. 521.

(1) [See *Procter v. Moore*, 1 Mass. Rep. 198. *Baker v. Wheaton*, 5 Mass. Rep. 509. *Blanchard v. Russell*, 13 Mass. Rep. 1. *Bradford & al. v. Farrand*, *ibid.* 18. *Walsh v. Farrand & al.* *ibid.* 19. *Prentiss & al. v. Savage*, *ibid.* 20. *Watson v. Bourne*, 10 Mass. Rep. 337. *Sturges v. Crowninshield*, 4 Wheat. 122. *Van Raugh v. Van Arsdaln*, 3 Caines's Rep. 154. *White v. Canfield*, 7 Johns. 117. *Hunt v. Brooks*, 18 Johns. 5. *McKim v. Marshal*, 1 Har. & J. 101. *Martins v. Ballard*, Bee's Rep. 258. *Woodbridge v. Wright*, 3 Conn. Rep. 523. *Rowland v. Stevenson*, 1 Halsted's Rep. 148. as to the operation and effect of the insolvent laws of the different states.

A discharge under the bankrupt law of the United States does not discharge the debtor from debts contracted and made payable in a foreign country, unless the creditors come in and prove their debts under the commission. *McNenomy v. Murray*, 3 Johns. Ch. Rep. 435. A discharge under a State insolvent act, from all debts, duties, contracts, and demands outstanding at the time of such discharge, upon a *cessio bonorum*, does not protect the debtor against a debt contracted in a foreign country with a foreigner. *Van Reimsdyk v. Kane & al.* 1 Gallison, 371. 9 Cranch, 153. S. C. A discharge under a foreign bankrupt law is no bar to an action in the courts of this country, on a contract made in the United States. *McMillan v. McNeil*, 4 Wheat. 209. A certificate of discharge under the U. States bankrupt law is a bar to foreign as well as domestic debts that might be proved under the commission. *Murray v. De Rottenham*, 6 Johns. Ch. Rep. 58. See *Ward v. Harris*, 4 Har. & McHen. 330, that the English statutes relating to bankrupts did not extend to the province of Maryland, nor operate on property which the bankrupt held there.]

PART
IV.

Proof in answer.

accruing after the acceptance, and shall not be liable to be sued in respect of any subsequent non-performance of the conditions, covenants, or agreements therein contained (*k*).

- * 207 In answer to evidence of a certificate, the plaintiff may show that it was obtained unfairly, and by fraud, * or that the bankrupt has concealed effects to the value of 10*l.* (*l*); that it was obtained from one of the creditors under a promise from the bankrupt to pay him his whole debt (*m*). If the plaintiff adduce evidence to prove concealment to the value of 10*l.*, the defendant may show that the concealment was not wilful (*n*). The plaintiff may also show that the certificate was obtained under a second commission of bankruptcy against the defendant, and then by the stat. 5 Geo. II. c. 30, s. 9, "the person only of the bankrupt is protected, if his effects are not sufficient to make a dividend of 15*s.* in the pound." It is sufficient for the plaintiff, in such case, to produce the former commission, and the proceedings under it, to show that the bankrupt submitted to it without proving the steps of the former bankruptcy in detail (*o*): but the certificate should be produced, or secondary evidence should be given of it after proof of notice to produce it in the usual way (*p*); and where there has been no notice to produce the certificate, proof of the affidavit of conformity is insufficient (*q*); but after proof of such notice, it has been held to be sufficient to prove, by the solicitor under the commission, that he was employed by the defendant to obtain his certificate, and had no doubt, from the entries in his books, that it had been obtained (*r*). The person who has the possession of
- * 208 the former commission * and proceedings should be served

(*k*) Where the lessee covenanted not to assign, and became bankrupt, and his assignees agreed to take the lease, and he came in again as assignee of the assignees, it was held that the covenant was discharged under the above statute. *Doe v. Smith*, 5 Taunt. 795. 1 Marsh. 359. S. C. As to proof of acceptance, *vide supra*, 200.

(*l*) Under the stat. 5 Geo. II. c. 30, s. 7.

(*m*) *Phillips v. Dicus*, 15 East, 248.

(*n*) *Cathcart v. Blackwood*, in Dom. Pro. 1765.

(*o*) *Haviland v. Cooke*, 5 T. R. 655. 3 Esp. C. 195.

(*p*) *Gregory v. Merton*, 3 Esp. C. 195. *Graham v. Grill*, 4 Camp, 282. *Vide infra*, note (*s*).

(*q*) *Graham v. Grill*, 4 Camp. 282.

(*r*) *Henry v. Leigh*, 3 Camp. 499, as from entries which such solicitor made in his books. *Qu.* whether the book kept by the secretary of bankrupts be secondary evidence. *Ibid.*

with a *subpœna duces tecum* to produce them (*s*). After such proof by the plaintiff, it lies on the defendant affirmatively to prove that he has paid 15*s.* in the pound under the second commission (*t*); proof that it will *probably* produce so much is insufficient (*u*).

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IV.
Proof to defeat
the certificate.

Where the action is brought before a dividend has been made under the second commission, or the period has elapsed under the stat. 5 Geo. II. c. 30, s. 37, the certificate will be no bar, if it be shown that it is not probable that the bankrupt will be able to pay 15*s.* in the pound. So the plaintiff, under the stat. 5 Geo. II. c. 30, s. 9, may show that the defendant has compounded with his creditors (*x*), or delivered to them his estate and effects, and been released by them (*y*). Where the defendant had compounded with his creditors, but afterwards, and before he became bankrupt, paid them the whole of their debt, and did not pay 15*s.* in the pound under a subsequent commission, his certificate under it was held to be a bar (*z*) to a subsequent action.

Compounding
with creditors,
&c.

* Under the same section (*a*) the plaintiff may also show that the bankrupt has been discharged under an act for the relief of insolvent debtors. The plaintiff may also rely, in answer to the certificate, on the 12th section of the same statute; that is, If upon the marriage of any of his children, the bankrupt shall have given above the value of 100*l.*, unless he shall prove by his books, or otherwise, upon oath before the commissioners, that he had at the time, over and above the value so given, sufficient to pay all his creditors their debts; or if he shall have lost in any one day at any game, or by having a share in the stakes or bet-

* 209
Certificate,
Answer.

(*s*) It seems that the book at the bankrupt-office, in which entries are made of the allowance of certificates by the Chancellor, is not secondary evidence of the allowance of the certificate; for it is not seen or referred to by the Chancellor, and the entries are not made by any officer of the court appointed for that purpose. *Henry v. Leigh*, 3 Camp. 499.

(*t*) *Gregory v. Merton*, 3 Esp. C. 195.

(*u*) *Coverley v. Morley*, 16 East, 225; and *qu.* whether the actual payment of 15*s.* in the pound be not a condition precedent. See the judgment of Bayley, J.; and see 1 B. & P. 467.

(*x*) This clause, it has been held, does not contemplate limited compositions with part of a trader's creditors, but general ones only, such as would admit all creditors of whatsoever description. *Norton v. Shakespeare*, 15 East, 619. See *Slaughter v. Cheyne*, 1 M. & S. 182.

(*y*) *Jelfs v. Ballard*, 1 B. & P. 467.

(*z*) *Read v. Sowerby*, 3 M. & S. 78,

(*a*) 5 Geo. II. c. 30, s. 9.

PART
IV.

ting, on either side, the value of 5*l.* (*b*), or 100*l.* in the whole, within 12 months next preceding the bankruptcy : Or, if within one year next before he became a bankrupt, he shall have lost 100*l.* by any contract, with respect to any stock of any company or corporation, or any parts or shares of any public funds or securities, where the contract was not to be performed within one week from the making of such contract, or where the stock was not actually transferred or delivered in pursuance of the contract.

Under the stat. 49 Geo. III. c. 121, s. 6, the plaintiff may show, in answer to a certificate, that the defendants being assignees of a bankrupt, were indebted to the estate of the bankrupt in the sum of 100*l.* or upwards, in respect of money come to their hands as assignees, and wilfully retained or employed by them for their own benefit.

* 210 Under the stat. 24 Geo. II. c. 57, s. 9, the plaintiff may shew, in avoidance of the certificate, that the *bankrupt fraudulently permitted proof of debts under the commission, by persons to whom he was not indebted in the sums so proved, and that they signed the certificate ; and to prove this, those persons may be called, or the fact may be proved by presumptive collateral evidence (*c*). The plaintiff may also show, that the defendant gave money to creditors to induce them to sign the certificate, for this will avoid it (*d*) ; and the certificate is void if any one of the creditors, although without the privity of the bankrupt, was induced by money to sign the certificate (*e*). The plaintiff may also reply to the certificate, by evidence of an express promise by the bankrupt to pay the debt, and is not bound to declare specially on such subsequent promise (*f*). But it seems that if the promise be special to pay when he is able, the plaintiff should prove his ability at the time of

Subsequent
promise.

(*b*) Insuring in the lottery is not within this clause (*Lewis v. Piercy*, 1 H. B. 29) ; nor the keeping a lottery-office (*Ex parte Richardson*, Co. B. L. 463, 5th edit. Sel. N. P. 238). The plaintiff must elect whether he will give evidence of one loss to the amount of 5*l.*, or of several to the amount of 100*l.* *Hughes v. Morley*, Holt's C. 520.

(*c*) *Edmonstone v. Webb*, 3 Esp. C. 264.

(*d*) *Phillips v. Dicas*, 15 East, 248.

(*e*) *Holland v. Palmer*, 1 B. & P. 95.

(*f*) *Williams v. Dyde*, Peake's C. 68. *Truman v. Fenton*, Cowp. 544 ; but see *Penn v. Bennett*, 4 Camp. 206. *Leaper v. Tatton*, 16 East, 420.

the action brought (*g*); and the promise is not binding unless it be precise and positive (*h*) (1).

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IV.

A promise made by a bankrupt before he has obtained his certificate, will revive the debt, although the certificate be obtained afterwards (*i*). A mere admission * of the debt * 211 is insufficient (*k*), although accompanied by an unaccepted offer to pay the debt by instalments (*l*).

A bankrupt sued by his surety, who paid the debt subsequently to the bankruptcy, cannot avail himself of his certificate without having specially pleaded it (*m*).

IX. Upon an indictment against a bankrupt for a felonious embezzlement of his effects, &c. the steps of his bankruptcy must be strictly proved (*n*). Indictment against a bankrupt.

Where the petitioning creditor's debt was alleged to be due to *A. B.* and *C.*, surviving executors of the last will and testament of *D.*, after proof that *A. B.* and *C.* were the executors, and were directed by the will to carry on the

(*g*) *Besford v. Saunders*, 2 H. B. 116. [2 Serg. & Rawle, 208, *Kingston v. Wharton*, acc.] *Qu.* whether payment of interest after bankruptcy on a bond for the payment of money forfeited before bankruptcy, will render the bankrupt liable on the bond. *Alsop v. Brown*, Doug. 182.

(*h*) *Lynbuy v. Weightman*, 5 Esp. C. 198, where the bankrupt said that his effects would pay 20s. in the pound, and that he would pay every body, it was held that he was not bound.

(*i*) *Roberts v. Morgan*, 2 Esp. C. 736. And see *Ernst v. Sciacaluga*, Cowp. 527.

(*k*) *Fleming v. Hayne*, 1 Starkie's C. 370. 4 Esp. C. 36. 5 Esp. C. 198. *Bailey v. Dillon*, 2 Burr. 736. *Besford v. Saunders*, 2 H. B. 116. *Alsop v. Brown*, Doug. 182.

(*l*) *Ibid.*

(*m*) For the stat. 49 Geo. III. c. 121, s. 8, discharges the bankrupt, having his certificate, of all such demands at the suit of every such person, in *like manner* to all intents and purposes as if such person had been a creditor before the bankruptcy. *Stedman v. Martinnant*, 12 East, 664.

(*n*) See the form of the indictment, and the necessary allegations, Stark. Criminal Pleadings.

(1) [If a debtor, previous to a bankruptcy, promise a particular creditor to pay the debt, *when he shall be able*, his certificate of discharge is no bar to an action on the new promise, though the original debt might have been proved under the commission. *Kingston v. Wharton*, 2 Serg. & Rawle, 208. *Semb.* that though such creditor has proved the original debt, under the commission, and received a dividend, he may recover the *balance* in an action on the new promise. *ibid.* If a debtor, on the eve of bankruptcy, make a *new promise* to pay, in consideration of an agreement by the particular creditor not to prove under the commission, such promise is binding. *ibid.*]

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business, it was held to be necessary to prove that they all acted in discharge of the trust (*o*).

An allegation, that the commission issued under the great seal of Great Britain, is proved by evidence of an instrument issued under the great seal of the United Kingdom of Great Britain and Ireland (*p*).

Upon an indictment against a bankrupt for perjury, alleged to have been committed in his examination before the commissioners, it seems to be necessary to prove the bankruptcy in strict detail, and that the declaration of his bankruptcy by the commissioners, is not sufficient (*q*); for if he was not a bankrupt at the time, the commissioners * 212 had no jurisdiction to * administer an oath and examine him. The case of a person who makes a deposition, on which the judgment of the commissioners is to be founded, as to the bankruptcy itself, falls under a different consideration; the perjury may consist in the falsely swearing that the party was a bankrupt, so that if it were necessary to prove the bankruptcy, the perjured party could not be punished at all. In such a case the offence of perjury seems to be complete, independently of the question of bankruptcy, for a false oath is taken before commissioners duly authorized to administer the oath (*a*).

Competency of
witnesses.

X. The bankrupt himself is not a competent witness to increase the divisible fund in any action by the assignees, unless he has obtained his certificate, and released the surplus and proportional allowance, for otherwise his interest is obvious (*r*). And he is incompetent to prove any fact to sup-

(*o*) *R. v. Barnes*, 1 Starkie's C. 243.

(*p*) *R. v. Bullock*, 1 Taunt. 71.

(*q*) *R. v. Punshon*, 3 Camp. 96, Cor. Ellenborough, C. J.

(*a*) See *R. v. Raphael*, Abbott, J. Devon Spring Assizes, 1818, Manning's Index, 2d edit. 232, where it is stated to have been ruled, that on an indictment against a third person examined before the commissioners, their declaration that the party is a bankrupt is sufficient. It is not stated whether the examination in this case was preparatory to the declaration by the commissioners, or subsequent to it.

(*r*) *Kennet v. Greenwoollers*, Peake's C. 3. *Evans v. Gold*, B. N. P. 41. *Langdon v. Walker*, cited Cowp. 70. *Butler v. Cooke*, Ibid. In an action to recover money paid to a creditor out of voluntary preference, it was held that the wife of the bankrupt was a competent witness for the assignees, on the ground of indifference, since, if the assignees recovered, the defendants would recover to the same amount under the commission. *Jourdain v. Lefevre*, 1 Esp. C. 66, Cor. Ld. Kenyon. But the witness would not be indifferent, unless, exclusive of that debt, the estate would produce 20s. in the pound.

port the commission, either on an issue to try the bankruptcy, or in an action by the assignees to recover a debt due to the estate, even although he shall have obtained his certificate, and have released the assignees, for he is interested in the *certificate which is founded upon the bankruptcy (*s*). And it makes no difference, whether the question be asked upon an examination in chief, or upon his cross examination (*t*); neither can he be asked questions with a view to establish an antecedent act of bankruptcy (*u*). Accordingly, upon the trial of issues out of chancery, to try whether *Herbert* and *Ryton* were bankrupts, and whether they owed the petitioning creditor 100*l*. *Ryton*, who had obtained his certificate, was produced to prove the debt; but *Ryder*, C. J. was of opinion that he was not competent to prove that he and *Herbert* were jointly indebted to the petitioning creditor, or that they were partners, or that *Herbert* was a bankrupt, since each of those facts tended to support the commission; and if that were not good the certificate would become bad (*x*). But the rule is restricted to evidence affirming or disaffirming the bankruptcy. He is competent in an action by the assignees against a creditor who has levied under an execution, to prove the defendant's knowledge of his insolvency (*y*).

* A bankrupt is a competent witness to diminish the { 214

(*s*) *Field v. Curtis*, 2 Str. 829. *Flower v. Herbert*, 2 H. B. 279. *n. Chapman v. Gardner*, 2 H. B. 279. *Ewens v. Gold*, B. N. P. 41. In *Oxlade v. Perchard*, 1 Esp. C. 287, it was held that the bankrupt was competent to explain a doubtful act of bankruptcy. But this was overruled in *Rabbett v. Gurney*, 1 Montague, 489, and is contrary to *Chapman v. Gardner*, 2 H. B. 279. *Qu.* whether this rule is not to be regarded, in some instances at least, as a rule of policy rather than as a rule founded on the ordinary principle of exclusion on the score of interest; where, for instance, the bankrupt has obtained his certificate, and released his assignees, he has no immediate interest in the event of an action brought by the assignees, for the result would not affect his certificate. See Christian's B. L. 444, 2d edit. Debt by assignees of a bankrupt to recover money lost at play (9 Ann. c. 14), a release of the surplus by the bankrupt, and a general release by the creditors who have proved under the commission, is *prima facie* evidence that there are no other creditors sufficient to render him competent. Such a release extends to those things only which might afterwards come to the bankrupt. *Carter v. Abbott*, 1 B. & C. 444.

(*t*) *Elsom v. Bailey*, Sitt. after M. T. 50 Geo. III. Cor. Lawrence, J. 1 Sel. N. P. 253.

(*u*) *Wyatt v. Wilkinson*, 5 Esp. C. 187.

(*x*) *Flower v. Herbert*, cited 2 H. B. 279; and see *Cross v. Fox*, Ibid.

(*y*) *Reed v. James*, 1 Starkie's C. 134. See also *Hoffman v. Pitt*, 5 Esp. C. 22.

PART
IV.Competency of
bankrupt.

fund (y) ; but before he has obtained his certificate he is not a competent witness for his surety on a joint and several bond to defeat the action, although the obligees have elected to prove their debt under the commission, (under the stat. 49 Geo. III. c. 121, s. 125) since the bankrupt is still liable to be sued by the surety (z). Upon an action against the assignee of a bankrupt to recover the penalty upon an usurious loan of money to the bankrupt, it was held that the latter, who had not obtained his certificate, or repaid the money, was not a competent witness to prove the offence, although he was ready to release to the assignee all benefit which might arise from the discharge of that debt in particular, and also all claim to surplus and allowance (a), (1) and although the defendant had proved under the commission ; because (as it was said) the creditor might still bring an action at law, and arrest the bankrupt for the whole of the debt. But now, by the stat. 49 Geo. III. c. 121, the creditor after proving the debt could not afterwards in such a case sue the bankrupt (b) ; and even if he could, yet, as the verdict would not be evidence for the bankrupt in an action afterwards brought by the assignee, it seems that he would not be an incompetent witness on that ground (c).

Where two commissions have been issued, under both of which he has obtained his certificate, he is not competent to increase the funds, although he release his assignees,

(y) *Laingdon v. Walker*, cited Cowp. 70. *Butler v. Cooke*, Ibid.

(z) *Townend v. Downing*, 14 East, 565. See *Nares v. Saxby*, Marshall, 115.

(a) *Masters v. Drayton*, 2 T. R. 497. A bankrupt, although he has pleaded his certificate, is not, it is said, a competent witness for a co-defendant. *Raven v. Dunning*, 3 Esp. C. 25. *Emmet v. Bradley*, 1 Moore, 332. Peake's L. E. App. lxxxvii. *Currie v. Child*, 3 Camp. 283. *Secus*, where the plaintiff has entered a *Nol. Pros.* as to the bankrupt. *Milver v. Humble*, 16 East, 171. He is not a competent witness (it has been held) against the crown for his assignees, although he has released them, &c. *Crauford v. Attorney-general*, 7 Price, 5. He is a competent witness for an acceptor of a bill of exchange accepted for his accommodation, being released in the usual form by the defendant, for the effect of the release is to preclude the defendant from proving under the commission. *Cartwright v. Williams*, 2 Starkie's C. 240. He is also competent (having obtained his certificate, and released the surplus) to identify the proceedings under the commission. *Morgan v. Pryor*, 2 B. & C. 44. See Post. 301. 1385.

(b) See *Nares v. Saxby*, Marshall, 115.

(c) See tit. *Interest*.

(1) [*Sed vide Smith v. Prager*, 7 T. R. 60. *Commonwealth v. Frost*, 5 Mass. Rep. 53.]

unless he has paid fifteen shillings in the pound under the second commission, for till then the second certificate is no bar (*d*).

PART
IV.

* It has been said, that if the defendant calls the bankrupt as a witness, he waves all objections to his competency, and he may then be cross-examined as to the requisites of bankruptcy (*o*). Competency.
*215

Where the assignees sought to recover money paid to a creditor by way of voluntary preference, it was held that the wife of the bankrupt was a competent witness, on the ground that she stood indifferent in point of interest (*e*); since, if the assignees recovered the amount, it would be proved under the commission by the creditor. This decision, however, is founded on a mistake, since it is obvious that unless the estate be sufficient to pay 20s. in the pound, the dividend to the rest would be diminished by allowing any one creditor his whole debt.

A petitioning creditor is in general incompetent to support the commission (*f*), since he enters into a bond to the Chancellor, conditioned to establish the facts on which the commission depends, and to cause it to be effectually executed; but he is competent to cut it down (*g*). Creditors.

A creditor is in general an incompetent witness to increase the estate (*h*). It has been doubted, whether he is not competent where he has not proved his debt under the commission (*i*). But it seems to be now held that he is

(*d*) *Kennet v. Greenwoollers*, Peake's C. 3.

(*o*) *Fletcher and another v. Woodmass*, Sel. N. P. 253.

(*e*) *Jourdain v. Lefevre*, 1 Esp. C. 66.

(*f*) *Green v. Jones*, 2 Camp. 411. *Reed v. James*, 1 Starkie's C. 136. *Crooke v. Edwards*, 2 Starkie's C. 302; and *Ex parte Osborne*, 1 Rose, 287. 392.

A creditor to whom the bankrupt before his certificate has promised full payment, is not competent to support a second commission. *Roberts v. Morgan*, 2 Esp. C. 736.

A creditor of a bankrupt is a competent witness in an action against the defendant, for a fraudulent representation of the defendant's circumstances. *Burton v. Loyd*, 3 Esp. C. 207.

An Assignee being released is competent, for he is a mere trustee. *Tomlinson v. Wilkins*, 2 B. & B. 397.

A Commissioner is competent on an issue to try the validity of the commission. *Crooke v. Edwards*, 2 Starkie's C. 302.

(*g*) Per Ld. Ellenborough, 2 Camp. 411. 1 Starkie's C. 40, *Loyd v. Stretton*.

(*h*) *Egglesham v. Haines*, 12 Vin. 11. *Ambrose v. Clendon*, C. Temp. Hardw. 267. *Koopes v. Chapman*, Peake's C. 19. *Adams v. Malkin*, 3 Camp. 543.

(*i*) *Williams v. Stevens*, 2 Camp. 300.

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IV.

*216 incompetent in all cases, so long as he remains a creditor, whether he has or has not proved his debt, and whether an action be brought by the assignees to recover a debt, or the question be tried * on an issue, for a creditor has an interest in the preferable remedy for recovering his debt under the commission (*k*). But he is a competent witness for the assignees after he has assigned his debt (*l*). He is not a competent witness upon an issue to try whether the bankrupt has lost more than 5*l.* at one sitting by gaming (*m*); he would be entitled to a share of the bankrupt's allowance forfeited by the gaming. A creditor who has assigned his debt, although by parol only, is competent (*n*). He is *ex necessitate* competent to prove an act of bankruptcy under the stat. 4 Geo. III. c. 33 (*o*). A release by the creditor to the assignees is sufficient, without a release to the bankrupt (*p*).

Production of documents.

*217 Where the act of bankruptcy consists in the execution of a deed by the bankrupt, the Chancellor will order the person who has the possession of it to attend before the commissioners (*q*). If the petitioning creditor be called by the assignees, merely for the purpose of producing a promissory note on which the debt is founded, he is not liable to be cross-examined by the defendant (*r*). After the death of a witness his examination entered of record is evidence under the stat. 5 Geo. II. c. 30, s. 41 (*s*). A deposition formerly * made by a very old witness may be read to him in order to refresh his memory (*t*).

In an action on a promissory note against three partners, one of whom pleaded his bankruptcy, and proved it on the

(*k*) *Ex parte Malkin, in re Adams*, Cor. Gibbs, C. J. Sitt. after Hil. Term, 1814, 2 Christian's B. L. 453. 3 Camp. 545.

(*l*) *Granger v. Tudor*, 2 Bl. Rep. 1272.

(*m*) *Shuttleworth v. Bravo*, Str. 507.

(*n*) 4 Taunt. 326. *Granger v. Furlong*, 2 Bl. R. 1273.

(*o*) Which adjudges a member of parliament to be a bankrupt who does not pay or secure the debt, as prescribed by the statute, within two months after personal service of summons. Per Ld. Eldon, C. *Ex parte Harcourt*, 1 Rose's B. C. 203.

(*p*) *Koopes v. Chapman*, per Ld. Kenyon, Peake's C. 19. See Post. 1721.

(*q*) *Ex parte Treacher*, 1 Buck's B. C. 17.

(*r*) *Reed v. James*, 1 Starkie's C. 136. *Qu.* whether he is compellable by a court of law to produce the document. *Ibid.*

(*s*) See *Jansen v. Wilson*, Dougl. 257. The statute directs that the Chancellor shall appoint a proper person to enter the proceedings of record. An examined copy of a record so made would therefore be evidence.

(*t*) *Vaughan v. Martin*, 1 Esp. C. 440. •

trial, the Court would not allow a verdict to be taken for him pending the trial, to enable him to prove an alteration in the note to defeat the action (t).

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IV.

The examination of a party before the commissioners is evidence against him, although the whole of it was not taken down, having been signed by him after it had been read over to him (u).

For the evidence in an action of covenant by or against the assignee of a bankrupt, see tit. COVENANT.

BARGAIN AND SALE.

Vide supra, Part II. sec. cliv.

BARON AND FEME. See *Husband and Wife*.

BARRATRY. See *Policy of Insurance*.

BARRETRY.

UPON an indictment for this offence, the prosecutor must give the defendant notice before the trial of the particular instances of barretry intended to be proved (x).

BARRISTER. See *Confidential Communication*.

BASTARDY (y).

THE law, in its anxiety to protect the rights of children born of women in a state of wedlock, presumes * their legi-

Evidence to
prove bas-
tardy.
* 218

(t) *Currie v. Child*, 3 Camp. 283.

(u) *Milhoard v. Forbes*, 4 Esp. C. 172.

(x) 5 Mod. 18; 1 T. R. 754.

(y) Where the issue is upon the general bastardy of a party to an action, whether real or personal, the trial is by the certificate of the ordinary (2 Roll. 584, l. 35. 586. l. 7. 20. 3 Leo. 11). And as the certificate is peremptory, provided judgment be afterwards given, or the party alleging bastardy be nonsuited, proclamations are to be made in the Court and in Chancery, in order that all persons may have notice to attend the bishop (9 Hen. VI. 11). But where bastardy is alleged on special grounds not involving the marriage (2 Roll. 586. 3 Leo. 11), or where general bastardy is not directly in issue (ibid.), as in an action for calling the plaintiff a bastard, where the defendant justifies (2 Rol. 586. Hob. 179), or where the party alleged to be a bastard is a stranger, is dead, or is an infant, or if the issue arise on a plea in abatement, the issue is to be tried by the country; and the reason of this is, that the certificate of the ordinary would be peremptory, and in such instances the party or his representatives ought not to be concluded. See 2 Roll. 584. Com. Dig. tit. Bastard, D. 2.

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IV.

Of a child born
in wedlock.

timacy, unless the contrary be satisfactorily established by those who deny it. It has, indeed, in some instances, been held that the presumption of legitimacy from non-access could not be overcome by any proof less than that of the absence of the husband *beyond seas* previous to and during the whole time of gestation (z). (1) But it seems to be now settled, that if such non-access be proved as plainly shows that the husband could not in the course of nature have been the father of the child, the proof will suffice to bastardize the child (a); as, where it is proved that the husband had no access for more than two years previous to the birth of the child, until about a fortnight previous to the birth (b).

If there be a separation by consent, the presumption of law will still be in favour of access and of legitimacy till

(z) 4 Vin. Ab. 21, B. pl. 3, 4, 5, & 6.

(a) *Pendrell v. Pendrell*, 2 Stra. 925. *R. v. Bedall*, Andr. 8. Str. 1076. Rep. Temp. Hardw. 379. Stra. 51.

(b) *R. v. Luffe*, 8 East, 193. In the case of the Banbury claim of Peerage, 2 Selw. N. P. 709, 4th edit. the following questions were proposed to the Judges:—First, whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child; the husband not being impotent, except such proof as goes to negative the fact of generating access. Secondly, whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact.

On the 4th of July 1811, the Lord Chief Justice of the Common Pleas delivered the following unanimous answers: First, "That in every case where a child was born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse was presumed to have taken place between the husband and wife, until that presumption was encountered by such evidence as proved, to the satisfaction of those who were to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could according to the laws of nature be the father of such a child."—Secondly "That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, could only be legally resisted by evidence of such facts, or circumstances, as were sufficient to prove to the satisfaction of those who were to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child: That where the legitimacy of a child in such a case was disputed, on the ground that the husband was not the

(1) [Under a statute of Kentucky, a husband absenting himself for seven years is presumed to be dead, unless there be proof to the contrary; and if his wife bear a child by another, the father may be convicted of bastardy. *Hall v. Commonwealth*, Hardin, 479.]

the contrary be proved (c) ; but if there be a divorce *à mensâ et thoro*, non-access will be presumed, for (as it is said) it will be intended that the parties obeyed the sentence of the Court (d).

* It has been held from very early times, that issue born during wedlock might be bastardized by proof of a natural impossibility that the husband could have been the natural father. In *Foxcroft's* case, 10th of Edw. I. (e), where the husband was an infirm, bedridden man, a child born within twelve weeks after the marriage, was held to be a bastard. So it was held, where the husband was shown to be within the age of puberty (f). So, where the husband was under the age of fourteen (g). But evidence that a husband was divorced from his first wife for impotence, does not prove the bastardy of a child born during the second marriage (h).

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father of such a child, the question to be left to the jury was, whether the husband was the father of such child : and the evidence to prove that he was not the father must be of such facts and circumstances as were sufficient to prove, to the satisfaction of the jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child."

"That the non-existence of sexual intercourse was generally expressed by the words, 'non-access of the husband to the wife,' and that the Judges understood those expressions as applied to the present question, as meaning the same thing ; because in one sense of the word access, the husband might be said to have access to his wife, as being in the same place, or in the same house, and yet under such circumstances, as instead of proving, tended to disprove, that any sexual intercourse took place between them."

(c) 1 Salk. 123.

(d) Ibid.

(e) 1 Roll. Ab. 359. It does not appear, from the abridged note of the case in Rolle, whether the inability existed at the time of conception ; but it must necessarily be presumed that it was so proved, for the inability at the time of marriage, twelve weeks only before the birth, would be perfectly immaterial.

(f) 1 Roll. Ab. 358. In *Lomar v. Holmden*, 2 Str. 940, evidence of inability from a bad habit of body was admitted ; but the evidence amounting to an *improbability* only, and access being presumed from the visits of the husband, the evidence was deemed to be insufficient.

(g) Year-book, 1 Hen. VI. 3, b.

(h) Com. Dig. Bastard (B) 5 Co. 98, b. 2 Leo. 169. 173. 2 Dyer, 179, a. *Sabell's case*, and *Bury's case*. For, as is said, a man may be *habilis & inhabilis diversis temporibus*, and this whether the divorce was *causa impotentia quoad hanc*, or *propter perpetuam impotentiam* (Mo. 227), 1 And. 105. 2 Leo. 169. [The law seems formerly to have been different. See Lord C. J. Treby's note to 2 Dyer, 179. a.]

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Where the husband is within the realm, it is not incumbent on the party alleging bastardy to prove that the husband could not by any possibility have had access to the wife; it is sufficient to adduce such circumstantial evidence as satisfies the minds of the jury (i) (1).

* 220 The removal of the husband to a place distant from the wife, her cohabiting with another man, and the fact, that the son, whose legitimacy is questioned, took * the name of the latter from his birth, which he and his descendants afterwards retained, is strong evidence to prove the illegitimacy (k). So it may be proved that the mother was a woman of ill fame (l).

In *Lomax v. Holmden* (m), the marriage being proved, and evidence given that the husband was frequently in London where the mother lived, so that access must be presumed, the defendants were admitted to give evidence of his inability from a bad habit of body, but the evidence showing an improbability only, the plaintiff had a verdict (n).

Where the birth occurs so soon after the marriage as to show that the conception was *ante-nuptial*, that circumstance will not affect the legitimacy; but that case stands upon its own peculiar ground. The marriage of the parties is then the criterion of legitimacy, at least it raises a presumption that the husband was the father of the child (o).

(i) *Goodright v. Saul*, 4 T. R. 356. And see *R. v. Bedall*, 2 Str. 1076.

(k) *Ibid.* And a new trial was granted, the judge on the first having informed the jury that the *possibility* of access must be negatived.

(l) *Pendrell v. Pendrell*, 2 Str. 925. B. N. P. 113.

(m) B. N. P. 113.

(n) *Lomax v. Holmden*, 6 Geo. II. at Bar. 2 Str. 940. B. N. P. 113.

(o) See the observations of the Judges in *R. v. Luffe*, 8 East, 193.

(1) [In Pennsylvania, when the husband has access to the wife, no evidence short of absolute impotence of the husband is sufficient to convict a *third person of bastardy* with the wife. *Commonwealth v. Shepard*, 6 Binney, 283. But if they live at a distance from each other, so that access is very improbable, *the legitimacy of a child* may be decided upon a consideration of all circumstances. *ibid.*

A child born during marriage may be proved to be a bastard—*first*, by evidence of the husband's inability; *secondly*, by proof of non-access to his wife; *thirdly*, by proof that the child was born out of due time; or, *fourthly*, that it was born during the mother's open cohabitation with another man, and was considered illegitimate by the family. *Commonwealth v. Stricker*, 1 Browne's Rep. Appx. xlvii.]

In this respect our law adopts the rule of civil law, according to which, the offspring was legitimate if the parents married at any time before the birth (*p*). It seems, however, that in such case it is competent to prove that it was impossible that the husband could have been the father, for a stronger presumption cannot arise in such a case than is made in favour of a child conceived after wedlock (*q*) (1). It is said, that although the wife was precontracted, or within the prohibited degrees of consanguinity or affinity, yet if she be not afterwards divorced, the issue will not * be bastards (*r*); and that after the death of the parties * 221 the marriage cannot be drawn into question to bastardize the issue (*s*) (2).

Although there has been an actual marriage the issue may be bastardized by proof that the marriage was actually null and void; as by evidence that one of the parties had a wife or husband still living (*t*), or by proof of a divorce *a vinculo matrimonii* (*u*) (3). But a divorce cannot

(*p*) See 8 East, 210.

(*q*) And see *Forcroft's* case, above cited, 1 Roll. Ab. 359. But see 1 Roll. 358, l. 20.

(*r*) 1 Roll. 357, l. 42. 45.

(*s*) Ibid; and Com. Dig. Bastard (B). But the marriage may after the death of the parties be proved to be void.

(*t*) See *Marriage, Pedigree, Polygamy*.

(*u*) 2 Rol. 586, l. 20. For the causes of such a divorce, see Com. Dig. Baron and Feme, C. 1; & *supra*, part II. sec. lxxviii. p. 231, as to the effect of a judgment in the spiritual court.

(1) [In North Carolina, a married woman may make the oath required by the statute of 1741, ch. 14, accusing a man of being the father of a bastard child begotten before her marriage. *Wilkie v. West*, 1 Murphey, 319. And in Tennessee, if a single woman charges A. as father of a child with which she is *enseinte*,* and before the child is born, she marries B.—A. is nevertheless chargeable with its maintenance. *State v. Ingraham*, 2 Hayw. Tenn. Rep. 221.]

(2) [The legitimacy of a child will be presumed, on slight proof, after the lapse of thirty years, and the death of the parents and the child. *Johnson v. Johnson*, 1 Desauss. 595.]

(3) [After a divorce *a vinculo*, in Massachusetts, for adultery, a marriage contracted there by the guilty party is illegal and void, and the issue thereof illegitimate—But such marriage in another state, where it is permitted by the laws thereof, will so far render it valid in Massachusetts as to entitle the issue to the rights of legitimate children. *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 1 Pick. 506. So where a mulatto and a white person belonging to Massachusetts, (where their intermarriage was prohibited and made void by statute) went to Rhode Island, where such intermarriage was not forbidden by law, and were there mar-

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be prosecuted after the death of the parties (*x*). Nor can a marriage be drawn in question upon any collateral surmise after the death of either of the parties, such as that it was incestuous (*y*), in order to bastardize the issue. The effect of sentences in the ecclesiastical courts has already been considered (*z*).

In the case of a posthumous child (*a*), its legitimacy appears to be a question of fact to be tried by a jury (*b*),

(*x*) 1 Roll. 360, H. 1 Salk. 121. Com. Dig. Baron and Feme, C. 6.

(*y*) Carth. 271. Comb. 200. 4 Mod. 182. 12 Mod. 35. 2 Salk. 548.

(*z*) *Supra*, Vol. I. p. 231, & seq.

(*a*) *Alsop v. Stoney*, 17 J.—B. R. Co. Litt. 123, b. by Hargrave and Butler, in the note. The wife, who was, it seems, a lewd woman, was delivered of a child forty weeks and ten days after the death of the husband, and it was held to be legitimate (Hale's MSS.) So where the child was born forty weeks and eleven days after the death of the first husband. 18 Rich. II. Hale's MSS. See Cro. Jac. 541. Godb. 281. Palm. 9.

(*b*) It has been quaintly said that the law does not appoint any certain time for the birth of a child, and that it is sufficient for the purpose of legitimacy if it be born within a few days after the forty weeks, if it can be proved by circumstances to be the issue of the husband (1 Rol. 356, l. 10. Cro. Jac. 541. Palm. 9. The Roman law was very liberal in this respect. The Decemviri allowed that a child might be born in the tenth month; and although a law in the Digest excluded the eleventh, yet the emperor Adrian, after consulting with *philosophers* and physicians, decreed even to this extent, where the mother was of good and chaste manners (Dig. 1. 4. 12). See the note by Hargr. & Butler, 1 Inst. 123, b. from which it appears that the judges of Friesland in one instance allowed to the extent of twelve lunar months, *minus* three days. It is not probable that an English jury would go quite so far.

The very learned editors of Lord Coke's Institutes procured the following information from Dr. Hunter.—“1. The usual period of gestation is nine calendar months; but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time from three months, but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time; at six months it cannot be. 3. I have *known* a woman bear a living child in a perfectly natural way fourteen days later than nine calendar months, and believe two women to have been delivered of a child alive in a natural way above ten calendar months from the hour of conception.”

Lord Coke lays it down as a peremptory rule, that forty weeks is the longest time to be allowed for gestation (Co. Litt. 123); this, however, seems to be without foundation. See the note by Hargr. & Butler, Co. Litt. 123, b.

ried, and immediately returned to Massachusetts, the marriage was held to be valid in the latter state, and the issue legitimate. *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. Rep. 157.]

* unless it appear to be manifestly impossible, according to the course of nature, that the child can be legitimate.

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A case is mentioned in the books (c), where the child was found to be born eleven days *post ultimum tempus legitimum mulieribus pariendi constitutum*, and because of that fact, *et quia per veredictum juratorum invenitur quod prædictus Robertus* (the husband), *non habuit accessum ad prædictam Beatricem per unam mensem ante mortem suam per quod magis præsumitur contra prædictum Henricum* (the issue), therefore the brother and heir of Robert had judgment to recover in assize; and L. C. J. Rolle adds a note to that case, that the jury found that the husband languished of a fever long before his death (d). Hence it appears, that in addition to the mere presumption, from the interval which elapses between the death of the husband and birth of the * child, other circumstances are admissible to confirm that presumption. And in *Pendrell v. Pendrell* (e) it was held, that the party who disputed the legitimacy might show that the mother was a woman of ill fame.

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Where a woman marries so soon after the death of the first husband, that it is uncertain which is the father, it is a question of fact to be tried by a jury (f). Competency.

Either of the parents is competent to prove the bastardy of a child for want of a legal marriage, although such evidence is open to much observation (g). It has been said, that the mother being a married woman is not competent to prove the non-access of the husband, as it seems, upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter which affects his interest or character, unless in cases of necessity (h); and on that account, it is at all events allowable to

(c) Roll. Ab. 356.

(d) Ibid.

(e) 2 Str. 925.

(f) Hale's MSS. Cro. J. 686. Winch, 71. Litt. R. 177. Thecar marries a lewd woman, but she doth not cohabit with him, and is suspected of incontinency with Duncomb; Duncomb, within three weeks after the death of Thecar, marries her; 281 days and sixteen hours after his death she is delivered of a son; and it was agreed, that though it was possible that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of Thecar.

(g) 6 T. R. 330, 331. Or to prove the legitimacy *Ibid.* It is said that the sole evidence of the mother, a married woman, shall not be sufficient to bastardize her child. Rep. Temp. Hardw. 79. *R. v. Book*, 1 Wils. 340. Sayer, 61. S. C. See also *Standen v. Standen*, Peake's C. 32. *Standen v. Edwards*, 1 Ves. jr. 132.

(h) *R. v. Bedall*, 2 Str. 941. 1076. R. T. Hardw. 379. Andr. 9.

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examine her, as to the fact of her criminal intercourse with another, since it is a fact which must probably be within her own knowledge, and that of the adulterer only (i) (1).

* 224 * But the parents are competent witnesses to prove the legitimacy of their children (l).

So the mother is competent to prove the access of the husband (m).

The declarations of the wife during her life-time are not admissible in evidence, except for the purpose of contradicting her (n).

As cohabitation and repute are evidence to prove the fact of marriage, so declarations by deceased parents, as to their being or not being married, are evidence as accompanying and explaining such cohabitation, and the presumption arising from cohabitation is either strengthened or destroyed by such declarations (o). * So it

In the case of *Goodright v. Moss*, Cowp. 591, Lord Mansfield says, it is a rule founded in decency, morality, and policy, that the parties shall not be permitted after marriage to say that they had no connection. *R. v. Reading*, B. N. P. 112. Cun. Rep. 140. Rep. Temp. Hardw. 79.

(i) See Ld. Ellenborough's observations, *R. v. Luffe*, 8 East, 202—where an order of bastardy was stated to be made upon the oath of the wife, as otherwise it was held to be good, since it was to be presumed that the non-access of the husband was proved by other witnessess, or if proved by her also, that the judgment of the justices was founded on the other proof. *R. v. Luffe*, 8 East, 193. And see *R. v. Lubbenham*, 4 T. R. 251. *R. v. Kea*, 11 East, 132.

(l) In *Lomax v. Lomax*, (Cor. Ld. Hardwicke,) the mother was admitted to prove the marriage; and in an ejectment against *Sarah Brodie*, Hereford, 1744, Wright, J. admitted the father to prove the daughter legitimate, her title being as heir at law to her mother. And see *Stapleton v. Stapleton*, Ca. T. Hardw. 277. *Lord Valentia's* case, in D. P. Cowp. 593. *Sacheverell's* case, B. N. P. 241.

(m) *Pendrell v. Pendrell*, Cor. Lord Raymond, 2 Str. 925. B. N. P. 287. But where she has been called, her declarations are evidence to contradict her. *Ibid*; and B. N. P. 113.

(n) 2 Str. 925.

(o) B. N. P. 294, where it is said that such declarations are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief one way or other. In *May v. May*, B. N. P. 112 on a trial at bar on an issue out of Chancery, the preamble of an act of parliament, reciting that the plaintiff's father was not married, to the truth of which he had sworn, was given in evidence; yet, upon proof of constant cohabitation, and of his having always

(1) [On an indictment for fornication and bastardy, in Pennsylvania, a married woman is a competent witness to prove the criminal connexion with her, but not to prove the non-access of her husband. *Commonwealth v. Shepard*, 6 Binney, 283. S. P. also in several cases in the Appendix to 1 Browne's Reports.]

seems they are admissible to prove whether the child was born before or after marriage (*p*); but they are not admissible to prove the illegitimacy of a child born in wedlock. (*q*) (1)

The declaration by a deceased husband that his wife was a legitimate child is evidence, for it is probable, that although not connected with her by blood, he would know the fact (*r*). And so would the declarations of members or relations of the family, or perhaps of others living in habits of intimacy with them (*s*).

One charged as a reputed father of a bastard cannot be compelled to give evidence tending to prove the fact (*t*).

As to the competency of inhabitants of a parish in cases of bastardy, see tit. *Interest—Inhabitant*.

BILLS OF EXCEPTIONS. See P. III. p. 430, & seq.

BILLS OF EXCHANGE.

UNDER this head may be considered,

- I. *The evidence in an action on a bill or note.*
- II. *The evidence in defence.*
- III. *The competency of witnesses.*
- IV. *The effect of a bill or note in evidence.*

I. ACTIONS on bills of exchange differ from actions upon parol contracts, principally in these circumstances, 1st, it is in general unnecessary for the plaintiff * to prove the * 226 consideration for which the bill or note was given, the bill

acknowledged her to be his wife, the marriage was established. But where, in a settlement case, there was no evidence either as to the parentage, place of birth, or illegitimacy, except the testimony of the father, who denied any marriage, the court of K. B. held, that however difficult it might be to admit his evidence to bastardize a reputed legitimate child, yet, as all depended upon his testimony, the whole must be taken together. *Parish of St. Peter, Worcester, v. Old Swindford*, B. N. P. 112.

(*p*) *Goodright v. Moss*, Cowp. 591. *R. v. Bramley*, 6 T. R. 330.

(*q*) *Ibid*.

(*r*) *Vowels v. Young*, 15 Ves. jun. 148.

(*s*) 3 T. R. 723. B. N. P. 295. 1 M. & S. 689. *Supra*, Vol. I. 55. 62.

(*t*) *R. v. St. Mary's, Nottingham*, 13 East, 58, in note.

(1) [A husband's declarations that a child born in wedlock is not his, are not sufficient evidence to prove it illegitimate, notwithstanding it was born only three months after the marriage, and a separation between his wife and him took place by mutual consent. *Bowles v. Bingham*, 2 Munf. 442.]

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or note being in itself *prima facie* evidence of a sufficient consideration (u); and 2dly, because the interest in the bill, and the right of action consequent upon it, is of a transferable nature; so that in addition to the undertaking of the defendant, which is usually a consequence of his being a party to the bill, it is in many instances necessary to prove the plaintiff's title to sue.

Actions brought in respect of bills of exchange or promissory notes are either founded on the instrument itself, or upon a collateral liability.

Where the action is founded on the instrument itself, the liability of the defendant is either, 1st, primary and immediate upon his direct undertaking, where it is brought against the acceptor of a bill or maker of a note; or, 2dly, it is a secondary and conditional liability of adrawer or indorser consequent upon the default of the acceptor or maker; or, 3dly, the liability is consequent upon the party's own default in not paying the bill according to his undertaking; as, where the action is brought by a drawer or indorser who has been compelled to take up the bill against the acceptor, or by the acceptor, who has paid the bill, against the drawer.

The proofs will be considered in the following order:

Primary liability.	1. Proofs in an action by a	} v. {	An acceptor of a bill or maker of a note.
	payee or bearer - - -		
	2. - - - - - by an indorsee		
Secondary liability.	3. - - - - - by a payee - -	} v. {	The drawer of a bill or maker of a note. An indorser.
	4. - - - - - by an indorsee		
Collateral liability.	5. - - - - - by a drawer or	} v.	An acceptor.
	indorser - - - - -		
	6. - - - - - by an acceptor		A drawer.

* 227 * In an action by the payee against the maker of a note or acceptor of a bill, the proofs are *direct*, 1st. By the production of the note or bill, or proof of its destruction, &c. 2dly. Proof of the making of the note, or of the drawing and acceptance of the bill. 3dly. In some instances proof of the performance of conditions precedent, or presentment. 4thly. In some cases, of the identity of the payee, or title of bearer; or secondly, the proofs are *presumptive*.

Production or
proof of de-
struction.

1st. By the production of the bill or note. The ordinary proof of loss, in order to warrant the introduction of

(u) 4 Taunt. 115.

parol evidence of an instrument, is in this case frequently insufficient (*x*), (1) the instrument being of a negotiable nature, such proof must be given, where it is not produced, by evidence of its destruction, or otherwise, as shows that the defendant cannot afterwards be compelled to pay the amount again to a *bona fide* holder. In the absence of such proof the plaintiff cannot recover on the special count, or on the money counts, or upon the original consideration for which the bill or note was given, even although he has tendered to the defendant a bond of indemnity, for it may be still in existence, and the defendant may again be called upon to pay it (*y*.) (2) But where a bill has been specially indorsed to the plaintiff, (and for the same reason where it is made payable to the plaintiff specially) * the plaintiff may prove that it has been stolen, without having been indorsed by him, and recover on giving parol evidence of the contents (*z*).

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(*x*) See 1 Esp. C. 50. 1 Atk. 446. 1 Ld. Raym. 731. For the usual proof to warrant the introduction of secondary evidence, see above, Vol. I. p. 327.

(*y*) *Pierson v. Hutchinson*, 2 Camp. 211. 6 Esp. C. 126. S. C.—3 Camp. 324. 4 Taunt. 602. 6 Esp. C. 76. *Dangerfield v. Wilby*, 4 Esp. 159. The remedy of the loser of the note is in equity (1 Ves. 341. 6 Ves. 812. 16 Ves. 430). An express promise to pay the contents of a lost bill, without some new consideration, is void (*Davis v. Dodd*, 4 Taunt. 602). An indorser in blank cannot recover, even where the bill has been lost after notice of trial given, although more than six years have elapsed since the bill became due. *Poole v. Smith*, Holt's C. 144.

(*z*) *Long and others v. Bailie*, Guild. Dec. 1805, Cor. Ld. Ellenborough, 2 Camp. 214, (n).

(1) [Secondary evidence of the contents of a written instrument is not admissible, when the original is within the control or custody of the party. *Sebree & al. v. Dorr*, 9 Wheat. 558. But secondary evidence is admissible whenever it appears that the original is destroyed, or lost by accident, without any fault of the party. *Renner v. Bank of Columbia*, 9 Wheat. 581. In the case of a lost note, it is not necessary that its contents should be proved by a notarial copy—all that is required is, that it should be the best evidence the party has it in his power to produce. *Ibid*. The English practice of requiring a special count in the declaration, as upon a lost note, in order to let in secondary evidence of its contents, has not been adopted in the United States. *Ibid*. Of the evidence to prove a lost note, see *Peabody v. Denton & al.* 2 Gallison, 351. A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original is lost or mislaid, is not legal evidence to charge the drawer. *Wright v. Hancock & al.* 3 Munf. 521. See *Pintard v. Tackington*, 10 Johns. 104. *Holmes v. D'Camp*, 1 Johns. 34. *Angel v. Felton*, 8 Johns. 149. *Smith v. Lockwood*, 10 Johns. 366.]

(2) [In *Mecker & al. v. Jackson*, it was held by the supreme court of Pennsylvania, that there might be a recovery against the acceptor on a bill lost or mislaid—but that the plaintiff must indemnify the defendant against it. 3 Yeates, 442.]

PART
IV.Foreign bill.
Proof of the
making and
accepting.

In the case of a foreign bill drawn in sets, both the sets should be produced.

2dly. The next step is to prove the making of the note, or the acceptance, (and in some cases the drawing) of the bill.—Where the instrument has been signed by the defendant, and is unattested, the usual proof is by evidence of his hand-writing, or by evidence of his acknowledgment that it was signed by him (*a*). If the instrument has been attested by a subscribing witness, that witness must be called (*b*). Where the declaration alleges that the note was made, or bill accepted by a party, his proper hand being thereunto subscribed, it has been held that proof of the hand-writing of the party cannot be dispensed with, and that a precise allegation is essential, in order that the party may be prepared to show, if such be the fact, that no authority or procuration has been given (*c*). Some evidence as to the identity of the defendant with the party whose hand-writing, or whose authority to sign the note, is proved, is also necessary (*d*).

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Proof of ac-
ceptance.

* Where the defendant has accepted the bill, by writing upon it, or after sight of the bill, evidence of the drawer's hand-writing is unnecessary; the defendant, by the act of acceptance (*e*), admits the signature of the drawer, and his ability to draw the bill (*f*); but where the acceptance is

(*a*) See tit. *Admissions*.

(*b*) *Supra*, Vol. I. p. 330. A note for less than 5*l.* if not attested, is void by the stat. 17 Geo. III. c. 30, s. 31.

(*c*) *Levy v. Wilson*, 5 Esp. C. 180. But where the drawer's name had been indorsed by the wife, *Ld. Ellenborough* was inclined to think that such an allegation would be satisfied by proof that the name had been written by an authorized agent (*Holmsley v. Loader*, 2 Camp. 450); and where the declaration alleged that the defendants made a note in their own hands, &c. and the note had in fact been subscribed by one in the name of the firm, *Ld. Ellenborough* refused to nonsuit the plaintiffs. *Jones v. Mars*, 2 Camp. 305.

(*d*) *Supra*, Vol. I. p. 335. *Middleton v. Sandford*, 4 Camp. 34. B. N. P. 171. See *Nelson v. Whittall*, 1 B. & A. 19.

(*e*) Str. 442. 668. 946. *Taylor v. Croker*, 4 Esp. C. 187. *Robinson v. Yarrow*, 7 Taunt. 455. 1 Moore, 150. 3 Burr. 1354. Chitty on Bills, 286. 1 T. R. 655. But where the bill is payable to the drawer's order, proof of acceptance is no evidence of indorsement by the drawer (*Peake's C.* 20.) The acceptor is concluded by his acceptance as to the hand-writing of the drawer, although the bill be forged. *Smith v. Chester*, 1 T. R. 154.

(*f*) Consequently it is no defence on the part of the acceptor to show that the bill was drawn by an infant (*Taylor v. Croker*, 4 Esp. C. 187), or that the bill is forged (6 Taunt. 83. 4 M. & S. 15. *Leach v. Buchanan*, 4 Esp. C. 226), or by one without the authority of his supposed principal (*Porthouse v. Parker*, 1 Camp. 82), or by

made without sight of the bill, it is necessary to prove the drawer's hand-writing (g).

An allegation that a bill was drawn by certain persons using the firm of *A. & Co.* is satisfied by a bill drawn by *A.* in the name of such a firm, payable to *our order*, although *A.* has no partner (h).

If the action be against *several* makers or acceptors, the hand-writing of each must be proved (i); or if it be signed by one only in the name of the firm, it must be proved that they were partners (k) at the *time* of the acceptance. (1)

Acceptance by
several.

a single person, when it purports to have been drawn by several persons composing a firm (*Bass v. Clive*, 4 M. & S. 13). So if the party acknowledge the acceptance to be in his hand-writing, he cannot afterwards set up a forgery of the bill as a defence. *Leach v. Buchanan*, 4 Esp. C. 226.

(g) Peake's L. E. 220. Bayley on Bills, 219.

(h) *Bass v. Clive*, 4 M. & S. 13.

(i) Peake's C. 16. Chitty, 32. *Gray v. Palmers*, 1 Esp. C. 135. B. N. P. 279.

(k) Every partner has an implied authority to bind his co-partners by the drawing, accepting, and indorsing of bills for commercial purposes (7 T. R. 210. 10 East, 264. 13 East, 175). Hence an acceptance by one partner in the name of the firm, is *prima facie* evidence of the assent of all (13 East, 175. *Pinkney v. Hall*, 1 Salk. 126). But this presumption, arising from the relative situation of the parties (see tit. *Admissions*, p. 45), is liable to be rebutted, by proof that the party insisting upon the usual presumption, knew that the partner had no authority, as by proof of express notice to that effect. Where one partner gave express notice that he would not be responsible for bills signed in the name of the firm, it was held that he was not bound by a security given to the party to whom such notice was given, although the latter advanced money upon it for the payment of partnership debts, and although part was so applied (*Lord Galway v. Matthew*, 10 East, 264); or by proof of covin between the partner who signs the bill or note, and the party who takes it (*Ridley v. Taylor*, 13 East, 175). To prove fraud, it is not, it seems, sufficient to show that the holder took the bill in payment of the separate debt of the partner (*ibid.*) But the giving a bill in payment of the debt of two partners, contracted previously to their partnership, with a third, has been held to be fraudulent as against the third (*Shirreff v. Wilkes*, 1 East, 48. See *Swann v. Steele*, 7 East, 213. *Ex parte Bonbonus*, 8 Ves. jun. 542. *Williams v. Thomas*, 6 Esp. C. 18. 15 Ves. 286. 15 East, 10. *Pinkney v. Hall*, Salk. 126. 1 Camp. 108. 384. 403). In the case of a bill drawn on several partners, an acceptance by one need not be in the name of the firm (*ibid.*); but a promissory note drawn by one of several partners in his own name cannot be declared on as drawn by the firm, although given for a debt due to the partnership. *Siffkin v. Walker & another*, 2 Camp. 308.

(1) [If one partner, in a voyage on joint account, be authorized by the others to take up money on the credit of the whole concern,
and

PART
IV.Acceptance by
several.

* The implied authority of one to draw or accept a bill in the name of the firm, may be rebutted by proof of fraud, or of notice to the party, that the other partners would not be responsible for bills so drawn or accepted (*l*).

Where the action is against *A.* and *B.* as acceptors of a bill, and *A.* suffers judgment by default, the signature of *A.* must be proved as well as that of *B.* (*m*).

* 231 * An admission by one defendant that he accepted the bill will not be evidence against the co-defendants, without previous proof that they were partners at the time (*n*), and then his admission of the acceptance in the name of the firm will be evidence against all, even although the partnership was dissolved previous to making the admission (*1*).

Where all the partners except the defendant have been outlawed, it is still necessary to prove a joint acceptance by all; but in such a case *Ld. Ellenborough* held, that a letter written by that defendant, in which he admitted the partnership, was evidence of the fact (*o*); for in an action by him against the rest for contribution, the record in the present action would not be evidence against the rest to prove the partnership, and it would be necessary to prove the fact *aliunde*.

The provisions of the bank-act do not apply to a note issued by a mere commercial firm, though consisting of more than six members (*p*).

Proof of accep-
tance by an
agent.

Where the acceptance is by means of an agent, the authority of the agent must be proved (*q*). A letter of

(*l*) See the preceding note.

(*m*) *Bayley*, 227. 1 *Esp. C.* 135.

(*n*) *Gray v. Palmers*, 1 *Esp. C.* 135. *Wood v. Braddick*, 1 *Taunt.* 104.

(*o*) *Sangster v. Mazzaredo & others*, 1 *Starkie's C.* 161.

(*p*) *Wigan v. Fowler & others*, 1 *Starkie's C.* 459, and afterwards by the Court of K. B. See *Broughton v. Manchester Water Works Co.* 3 *B. & A.* 1.

(*q*) 1 *Esp. C.* 90. *Chitty*, 28. As to proof of agent's authority, see *tit. Agent*.

and draw bills therefor on a foreign house—and the partner take up money and draw a bill for the same, directing it to be charged to the account of all the partners, but it is signed by himself only—it seems that such bill is binding on all the partners: at least equity will enforce payment thereof against all the partners in favor of the payee of the bill, who has trusted the money on the faith of the joint credit. *Van Reimsdyk v. Kane & al.* 1 *Gallison*, 630.]

(1) [But see ante, p. 45, note (1)—*contra*.]

attorney from *A.* as executor, enabling *B.* to transact the executorship affairs, gives him an authority to accept bills of exchange drawn by a creditor relating to a debt due from the testator, so as to make *A.* personally liable (*r*). The agent who accepted the bill by the authority of another, is a competent witness to prove his authority (*s*). If the authority was in writing, the instrument must be produced and proved (*t*).

* Proof of an acceptance after the bill became due is sufficient (*u*). Where an executor declares upon promises to the testator, he must prove an acceptance in the lifetime of the testator. * 232
Time of acceptance.

A collateral acceptance may be proved either in writing (*x*), or by evidence of an oral assent (*y*) (1); and it is not necessary that the holder should be privy to such parol acceptance (*z*). What amounts to proof of an acceptance is a question of law, and not of fact (*a*). If the acceptance be by parol, the witness must be produced who heard the defendant accept the bill; and if it be in writing, it must be produced and proved; and if attested must be proved by the attesting witness. In general, a promise to accept an *existing* bill, if made upon an executed consideration, or if it influence any person to take or retain the bill, is a complete acceptance as to the person to whom the promise is made in the one case, and the

Proof of collateral acceptance.

(*r*) 2 H. B. 218. But see 6 T. R. 591.

(*s*) Ante, p. 62.

(*t*) *Supra*, tit. *Agent*, 55.

(*u*) 5 East, 514, *Wynne v. Raikes*.

(*x*) 1 T. R. 182. 186. *Pillans v. Van Mierop*, 3 Burr. 1663.

(*y*) *Lumley v. Palmer*, 2 Str. 1000. C. T. Hardw. 74.

(*z*) *Powell v. Monnier*, 1 Atk. 611. 5 East, 520. Where the bill was drawn in Jamaica by *A.* on *B.* in England, but a blank was left for the name of the payee, and *C.* having got possession of the bill inserted his own name as payee, held, that a letter from *B.* with the address torn off was not evidence to show that *C.* was the payee of the bill; it was held that the letter required a stamp. *Crutchley v. Mann*, 5 Taunt. 529.

(*a*) 1 T. R. 182. 186. But see *Rees v. Warwick*, 2 Starkie's C. 411. S. C. 2 B. & A. 113. *B.* undertakes to guarantee *A.*'s debt, and draws a bill on *A.*, which *A.* accepts; *B.* also writes an acceptance. *B.* is not liable as an acceptor; it is a collateral undertaking for the debt of *A.*, which must be specially declared on. 2 Camp. 447. *Beawes L. M.* 422.

(1) [See *Havens v. Griffin*, N. Chipman's Rep. 42. *Mayhew & al. v. Prince*, 11 Mass. Rep. 54.]

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ceptance.

person influenced on the other (*b*), and all the subsequent parties in each (*c*).

Where the acceptance is by a letter collateral to the bill, the letter must be produced, and the hand-writing proved; and evidence is also requisite to identify the bill in question with that mentioned in the letter.

- * 233 * An assurance by a collateral letter that the bill shall meet with due honour, is an acceptance (*d*); and so is an assurance of the drawee, by letter, that the bill shall be duly honoured (*e*). So a letter by the drawee, stating that the holder might rest satisfied as to payment, written after the bill was drawn, is an acceptance (*f*). But a promise to accept a non-existing bill is no acceptance (*g*) (1). An indorsee may avail himself of that as an acceptance, of which the drawer could not avail himself; as, where *A.* to give credit to *B.* made an absolute promise to

(*b*) *Milne v. Prest*, 4 Camp. 393.

(*c*) Bayley on Bills, 78. 5 East, 514. *Pierson v. Dunlop*, Cowp. 571. *Mason v. Hunt*, Doug. 297. *Clarke v. Cock*, 4 East, 57.

(*d*) *Clarke v. Cock*, 4 East, 57.

(*e*) *Powell v. Monnier*, 1 Atk. 611. 5 East, 520.

(*f*) *Wilkinson v. Lutwidge*, Str. 648. See also *Wynne v. Raikes*, 5 East, 514. *Clarke v. Cock*, 4 East, 57.

(*g*) *Johnson v. Collings*, 1 East, 98.

(1) [In *Coolidge & al. v. Payson & al.* 2 Wheat. 66, the Supreme Court of the United States, (affirming the judgment of the Circuit Court for the first circuit, 2 Gallison, 233,) decided that a letter written within a reasonable time *before or after* the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it—if shown to a person, who afterward takes the bill on the credit of the letter, is a virtual acceptance, binding on the person who makes the promise. *S. P. McKim v. Smith & al.* 1 Hall's Law Journal, 486. *Goodrich & al. v. Gordon*, 15 Johns. 6. In 2 Wheat. *ubi sup.* Mr. C. J. Marshall says, "it is not believed that the judgment given in the case of *Johnson v. Collings*, (1 East, 98), would, even in England, change the law as previously established. In that case, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances, which might give credit to the bill."

In *Wilson v. Clements*, 3 Mass. Rep. 1, the Supreme Court of Massachusetts held that a promise to accept a non-existing bill, would not operate as an acceptance, unless it were in writing, and shown to the person, who took the bill on its credit, within a reasonable time: And that a bill drawn *two years* afterward in favour of one who took it on the credit of the promise, was not binding on the drawee. See observations of Kent, C. J. in *McEvers v. Mason*, 10 Johns. 214, and of Spencer, J. in *Weston v. Barker*, 12 Johns. 284. See also *Storer v. Logan & al.* 9 Mass. Rep. 55.]

accept his bill, and *B.* showed the letter upon the Exchange (*h*).

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Where the plaintiff, being unable to prove the acceptance of the defendant upon the bill, proved, that when the bill was taken to the defendant's house for acceptance, a clerk in the defendant's banking-house answered that the bill would be taken up when due, (the defendant not being at home,) it was held that the proof was insufficient, without showing that the answer was given by the drawee, or his authority (*i*).

Proof of col-
lateral accep-
tance.
By agent.

A direction on the bill to another to pay the sum out of a particular fund is an acceptance (*k*). So any words written upon the bill which do not negative its request, as "accepted" (*l*) "presented," "seen," or the day of the month, are *prima facie* a complete acceptance. Even a refusal to accept written on a bill, will amount * to an acceptance, if it be shown to have been done with intent to deceive the party who presented it, and to delude him into the belief that the bill has been accepted (*m*).

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Where the drawee said on presentment of the bill, there is your bill, take it, it is all right, it was held to be no acceptance (*n*).

Where the drawee stated in his letter "your bill shall have attention," the Court held that the phrase was too ambiguous to amount to an acceptance, in the absence of evidence to show that in mercantile acceptation the phrase amounted to an unequivocal acceptance (*o*).

Where there is no direct evidence of acceptance, presumptive evidence may be resorted to in proof of the fact: for this purpose, the conduct of the parties, especially if it be explained by mercantile usage and understanding, is frequently very important. The fact that a bill sent to the drawee for acceptance has been *detained* by him, may be evidence of an acceptance; but according to the usual

Presumptive
evidence of
acceptance,

(*h*) Per Ld. Mansfield in *Mason v. Hunt*, Dougl. 299. Cowp. 571. Le Blanc, J. in *Johnson v. Collings*, 1 East, 105. *Clarke v. Cock*, 4 East, 70. But see *Milne v. Prest*, 4 Camp. 393.

(*i*) *Sayer v. Kitchen*, 1 Esp. C. 209.

(*k*) *Moore v. Withy*, B. N. P. 270.

(*l*) See *Pillans v. Van Mierop*, 3 Burr. 1663. *Mason v. Hunt*, Dougl. 297. *Powell v. Monnier*, 1 Atk. 611. 5 East, 220. *Pierson v. Dunlop*, Cowp. 571.

(*m*) Bayley, 78. Rep. Temp. Hardw. 75. But it is no acceptance if the drawee apprize the party at the time that what he had written was no acceptance.

(*n*) Per Ld. Kenyon, 1 Esp. C. 17.

(*o*) *Rees v. Warwick*, 2 B. & A. 113.

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course of commercial dealings, the mere neglect and silence of the drawee, or even a refusal to return the bill, or its actual destruction, does not *necessarily* make the drawee liable as acceptor (*p*).

* 235 The acceptance of a bill of exchange imports a *contract*, which requires the *assent* of the party; and acts of detention, disfiguring, cancellation, or even destruction, do not necessarily and conclusively prove *such assent, but are capable of explanation, by evidence of the usual course of dealing (*q*), and the conduct of the parties.

Proof of acceptance by mistake.

Evidence, it seems, is admissible to show that a bill with a cancelled acceptance upon it has been accepted by mistake (*r*). So proof may be given that a cheque has been cancelled by mistake, and it may be returned unpaid (*s*).

(*p*) See the case of *Jeune v. Ward*, 2 Starkie's C. 326. S. C. 1 B. & A. 653. 1 Camp. 425. *n. Bayley*, 81. *Mason v. Barff*, 2 B. & A. 26, *infra*, (*q*).

(*q*) *Mason v. Barff*, 2 B. & A. 26. Where the usage was to return the bills accepted, provided the goods had been delivered and the carrier's receipt sent, and the parties had made a second application to have the bill accepted which they had before sent, and an answer was returned that the invoice had not been received, but was expected shortly, the Court held that they could not afterwards treat the detention of the bill as an acceptance. Where a bill was drawn on the defendant, an executor, by a minor, to whom a legacy was to be paid by the defendant in a few days, and the bill being left at the executor's for acceptance, he detained it for a considerable time, and afterwards destroyed it, *Ld. Ellenborough* ruled, that the detention and destruction of the bill amounted to an acceptance; but the Court of K. B. (*Ld. Ellenborough dissent.*) afterwards, on a motion to set aside the verdict, held, that inasmuch as it appeared from the plaintiff's conduct that he did not rely upon the detention of the bill as an acceptance, but had used other means to intercept the money, the defendant could not be considered to be liable as an acceptor (*Jeune v. Ward*, 2 Starkie's C. 326. 1 B. & A. 653). Where the writing on the bill returned by the drawee is illegible, it has been doubted whether it should be declared on as an accepted or defaced bill. *Bayley*, 88, 89. *Trimmer v. Oddie*, *Ibid.* *Paton v. Winter*, 1 Taunt 420. And see *Thornton v. Dick*, 4 Esp. C. 270. *Clavey v. Dolbin*, Ca. T. Hard. 278. *Marius*, 29, 30. *Bentinck v. Dorrien*, 6 East, 199. *Harvey v. Martin*, 1 Camp. 425, *n.*

(*r*) *Bentinck v. Dorrien*, 6 East, 199, *semble*. And see *Bayley*, 88, 89. *Jeune v. Ward*, 2 Starkie's C. 326. *Paton v. Winter*, 1 Taunt. 420, 3. *Raper v. Birkbeck*, 15 East, 17. *Fernandey v. Glynn*, 1 Camp. 426, *n. contra.* *Thornton v. Dick*, 4 Esp. C. 270. *Trimmer v. Oddie*, *Bayley*, 88. In the case of *Cox v. Troy*, 5 B. & A. 474, the court decided that a drawee might erase his acceptance previous to any communication of his having accepted the bill. See *post*, 1091.

(*s*) *Fernandey v. Glynn*, 1 Camp. 426, *n.*

By the custom of London, the drawee of a cheque * coming through another banking-house, may retain it till five in the afternoon (t); but if a cheque be cancelled by mistake, it may be returned unpaid (u).

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3dly. The performance of conditions precedent.—

Whether an acceptance be absolute or conditional is a question of law (x). Where it is conditional, the plaintiff must allege that the condition has been performed; as, where the condition is that a house shall be given up to the acceptor on a day specified (y); or if the condition has not been performed, a legal excuse must be averred (z) and proved accordingly; and matter of excuse cannot be proved under an allegation of presentment (a), or that the event has happened upon which it is to become absolute (b).

Conditional
acceptance.

The payee, or other holder of a bill, may consider a qualified acceptance as a nullity, and cause the bill to be noted; but if he note for non-acceptance he is * precluded from afterwards insisting upon the transaction as an acceptance (c).

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Where the purchaser of goods requested A. to accept a bill drawn in favour of the seller, and to draw on B. for the amount, and A. accordingly drew upon B. for the amount, and B. refused to accept the bill, it was held that the drawing the bill by A. upon B. did not amount to an ac-

(t) 1 Camp. 426, n. Str. 415, 416. 550.

(u) 1 Camp. 425. Bayley, 81, n.

(x) *Sproat v. Matthews*, 1 T. R. 182. Where A. the joint consignee of goods in London, on being applied to accept a bill for the amount, refused to accept, because he did not know whether the ship would arrive at London or Bristol; on which B. the holder, agreed to leave it, reserving the liberty of protesting in case A. did not accept; and on a second application A. said he would accept the bill even if the ship were lost; held, that this was a conditional acceptance, depending on two events, the ship's arrival, in London, or being lost; and that B. having the liberty of refusing such conditional acceptance, could not afterwards note the bill for non-acceptance.

(y) See *Swan v. Cox*, 1 Marsh. 176. 3 Camp. 179. 5 East, 514.

(z) *Leeson v. Pigott*, Bayley, 187. *Bowes v. Howe*, 5 Taunt. 30.

(a) Ibid.

(b) Bayley, 44, n. c. *Sproat v. Matthews*, 1 T. R. 182. *Mason v. Hunt*, Doug. 299. *Smith v. Abbott*, Str. 1152. *Julian v. Shobrooke*, 2 Wilson, 9. *Pierson v. Dunlop*, Cowp. 571. Where the drawee of a bill, on account of a cargo consigned to him, says it will not be accepted till the ship with the wheat arrives; upon arrival it is an absolute acceptance. *Milne v. Prest*, 4 Camp. 393.

(c) *Bentinck v. Dorrien*, 6 East, 199, 200.

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acceptance.

ceptance by *A.* of the former bill, since he did not mean to make himself liable unless the bill he drew was accepted and paid (*f*).

The date written above the acceptor's signature upon a bill payable after sight is *prima facie* evidence of the time of acceptance, although the date be in a different handwriting, for it is usual for a clerk to write upon the bill the word "accepted," and the date, and for the drawee to write his name under the date (*g*).

By the stat. 1 & 2 Geo. 4, c. 78, from and after the 1st day of August 1821, if a person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, it shall be taken to be a general acceptance; but if the acceptor shall in his acceptance (which by sec. 2 must be in writing on the back of the bill) express that he accepts it at a banker's, or other place, and not otherwise or elsewhere, such acceptance shall be taken to be a special acceptance.

Presentment.

* 238 In an action against the maker of a note or acceptor of a bill, it is unnecessary to prove any presentment for payment unless the bill or note purport to be * payable, or be specially accepted as payable, at a particular place (*h*). But if the bill be so payable at a particular place, present-

(*f*) *Smith v. Nissen*, 1 T. R. 269. The drawee says, if you will send your bill to our counting-house I will give directions for its being accepted; this does not amount to an acceptance unless the bill be sent, 3 Camp. 179; 5 East, 514; 1 Atk. 611.

(*g*) *Glossop v. Jacob*, 4 Camp. 227. S. C. 1 Stark. C. 67.

(*h*) *Saunderson v. Judge*, 2 H. B. 509. And see the cases in the next note. The acceptors of a foreign bill of exchange who after presentment to the drawees for acceptance, and a refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsers, are not liable on such acceptance unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment, *Hoare v. Cazenove*, 16 East, 391.

In an action against the maker of a note payable at Guildford, a presentment at a banking-house at Guildford is a presentment to the defendant, although he lived in London, *Hardy v. Woodrooffe*, 2 Starkie's C. 219. Notice to the acceptor is unnecessary, even although the banker, at whose house the note is payable, has effects of the acceptor in his hands, *Smith v. Thatcher*, 4 B. & A. 200; *Treacher v. Hinton*, 4 B. & A. 413; *Edwards v. Dick*, 4 B. & A. 212. So in an action by the drawer against the acceptor of a bill payable at a bankers, presentment there is unnecessary, and the omission to present affords no defence, *Rhodes v. Gent*, 5 B. & A. 244.

ment must be proved, although payment be not mentioned in the body of the bill or note (i).

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IV.

If a note be made payable at a particular house, a demand there is a demand upon the maker (k).

*4thly. Where a bill is drawn with the payee's name in blank, and the plaintiff inserts his own name as payee, he must adduce evidence to show that he was intended as the payee (l). * 239 Identity of payee.

(i) According to the late decision in the House of Lords (*Rowe v. Young*, 2 B. & B. 165).—Previous to that decision, where no place of payment was specified on the bill, a special acceptance of the bill, making it payable at a particular place, was regarded by the Court of K. B. as a mere memorandum inserted for the purpose of apprizing the holder where he might apply for his money, and not as a condition restricting the general liability of the acceptor (*Fenton v. Goundry*, 13 East, 459, S. C. 2 Camp. 656. *Lyon v. Sundius*, 1 Camp. 423). But the contrary had been decided in the Common Pleas (*Ambrose v. Hopwood*, 2 Taunt. 61; and *Callaghan v. Aylett*, 2 Camp. R. 549), where it was held, that in case of a special acceptance, a presentment at the particular place was necessary (see *Huffam v. Ellis*, Bayley, 98. See also *Sanderson v. Bowes*, 14 East, 500; Bayley, 96. *Saunderson v. Judge*, 2 H. B. 509). In *Gammon v. Schmoll*, (5 Taunt. 344; 1 Marsh, 80), it was held, that if a drawee accept the bill payable at a particular place, the holder is not bound to receive it, but may resort to the drawee, as in case of non-acceptance; but that if the holder accept it, the acceptance interposes a condition precedent. (Ibid.) Whether an acceptance be absolute or conditional is matter of law. *Sproat v. Matthews*, 1 T. R. 182.

Where the bill or note is payable at a particular place, a presentment and demand must be alleged, unless a discharge be shown on the face of the declaration (*Bowes v. Howes*, 5 Taunt. 30); and an allegation that the makers of a note had become insolvent, and had ceased, and wholly declined and refused to pay at the place specified any of their notes, does not show a discharge of presentment and demand. (Ibid. 34.) But see *Howe v. Bowes*, (16 East, 112,) where it was held, that if the makers had become insolvent, and shut up and abandoned their shop, it was evidence of a declaration to all the world of their refusal to pay their notes there.

A promissory note, promising to pay so much at the defendant's banking-house, must be presented there (*Dickinson v. Bowes*, 16 East, 110). By the acceptance of the bill the drawee recognizes and adopts the place of payment specified in the bill. *Gray v. Milner*, 3 Moore, 90—(1).

(k) *Saunderson v. Judge*, 2 H. B. 509.

(l) *Crutchley v. Mann*, 1 Marsh. 29. S. C. 5 Taunt. 529. And held, that a letter from the acceptor promising to accept the bill, with the address torn off, was not evidence to prove the fact (ibid.)

(1) [See cases, English and American, collected by Mr. Howe, in a note to *Roche v. Campbell*, 3 Camp. 248. See also *Carley v. Vance*, 17 Mass. Rep. 389. 2 Phillipps on Ev. 26, 27—and American editor's notes.]

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If a note be made payable to *A.* in trust for *B.*, *A.* is the legal owner, and may sue upon the bill (*m*).

Where a note or bill is payable to the *bearer*, or where it has been indorsed in blank, the mere possession of the bill or note is *prima facie* evidence of the property in it (*n*).

Proof of a promissory note payable to *A. B.*, generally, is *prima facie* evidence of a promise to *A. B.* the father, and not to *A. B.* the son, their names being the same; but *A. B.* the son, although described in the declaration as *A. B.* the younger, bringing the action, and being in possession of the note, is entitled to recover upon it (*o*).

If a payee annex a condition to his indorsement before acceptance, the drawee who afterwards accepts the bill is bound by the condition; and if the condition be not performed, the right of action reverts to the payee, and he may recover against the acceptor (*p*).

A bill payable to the order of *A.*, is payable to *A.* if he make no order, and none is to be presumed (*q*).

Admissions.

* 240 * A promise to pay the amount of a bill, or part-payment of it, is an admission of the acceptance (*e*). An acknowledgment by one of several acceptors, of his own liability, is not evidence against the rest (*r*); but it is of his own, although made during a treaty for negotiation (*s*). Although the defendant on being applied to for payment, and without seeing the bill, desired the holder of the bill to call again, it was held that he might still prove that his acceptance had been forged; but on proof that he had on former occasions paid several similar bills drawn by the same person, Taylor, upon which, Taylor, who was connected with the defendant in business, had, it was supposed, written the defendant's name, it was held that the defendant had adopted the acceptance, and was liable on the bill (*t*).

And held also, that the letter, had it been efficient, would have required a stamp.

(*m*) *Smith v. Kendal*, 1 Esp. C. 231. 6 T. R. 112. *Evans v. Cramlington*, Carth. 5. 2 Vent. 309. *Skinner*, 264.

(*n*) Per Ld. Mansfield, Doug. 632. Bayley, 116. Chitty, 278. 289. *King v. Milson*, 2 Camp. 5. *Paterson v. Hardacre*, 4 Taunt. 115. 13 Ves. 49.

(*o*) *Sweeting v. Fowler*, 1 Starkie's C. 106.

(*p*) *Robertson v. Kensington*, 4 Taunt. 30.

(*q*) *Smith v. McClure*, 5 East, 476.

(*e*) *Jones v. Morgan*, 2 Camp. 474.

(*r*) 2 T. R. 713. 3 Esp. C. 60. 4 Esp. C. 226. Doug. 651. 1 Esp. C. 135. B. N. P. 273. Str. 640. 1051. 12 Mod. 309.

(*s*) 1 Esp. C. 143. B. N. P. 236. *Vid. infra*, *Presumptive Evidence on Bills*.

(*t*) *Barber v. Gingell*, 3 Esp. C. 60.

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If the acceptance of a bill appear on the face of it to have been cancelled, the plaintiff may still show that it was cancelled by mistake (*u*).

Before the bill is read the defendant may object the want of a proper stamp (*x*); or that the note or bill appears to have been cancelled, so as to throw upon the plaintiff the burthen of giving evidence in explanation, as, to show that the apparent cancellation was accidental, or resulted from mistake (*y*). The defendant cannot insist on reading an indorsement upon the * note, which is no part of the note * 241 itself (*z*); and a witness called to prove the hand-writing of a maker of a note cannot be cross-examined as to an indorsement to which there is an attesting witness (*a*).

The bill or note is then read in evidence, and must correspond with the record. In general, an allegation descriptive of the bill must be precisely proved, because a variance shows that the instrument produced is a different one from that declared on; but it is sufficient if an averment, according to the substance and effect, be substantially proved (*b*).

In the case of a note payable by instalments, where the days of payment are described in the declaration, a variance in one of the days of payment is fatal (*c*).

If the bill be alleged to have been *made* on the 3rd, and the bill produced bear date on the 6th, the variance is not material; and it is unnecessary to prove that the bill was really made on the 3rd (*d*). But a variance from the date of the bill, as alleged in the declaration, is fatal (*e*).

A variance as to the names of parties is fatal, where the allegation operates as a description of the bill; but otherwise, as it seems, where it merely relates to the names of the parties to the action, who might have pleaded the mis-

(*u*) *Raper v. Birkbeck*, 15 East, 17.

(*x*) See tit. *Stamp*, & *infra*.

(*y*) See *Raper v. Birkbeck*, 15 East, 17; and see Vol. I. p. 329. As to the question whether a drawee can cancel his acceptance before re-delivery, see *Bentinck v. Dorrien*, 6 East, 199.

(*z*) *Stone v. Metcalf*, 1 Starkie's C. 53. S. C. 4 Camp. 217.

(*a*) *Ibid*.

(*b*) See tit. *Variance*.

(*c*) *Wells v. Girling*, 3 Moore, 79. 1 Gow, 21.

(*d*) 2 Camp. 307. *n*. And see *Pasmore v. North*, 13 East, 517, where the note was issued and indorsed by the payee, who died before the day of the date.

(*e*) *Coron v. Lyon*, 2 Camp. 307. *n*. Fitzg. 130.

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IV.* 242
Variance in
names.

nomer in abatement, provided the identity be proved (*f*). Where a bill was alleged to * have been drawn by *Crouch*, (no party to the action) and the bill itself appeared to have been drawn by *Couch*, the variance was held to be fatal (*g*). And where in an action against three as the makers of a note, the declaration alleged it to have been made by William Austin, Robert Strobell, and William *Shutliff*, of whom, the two latter were outlawed in the action, and the bill, on the trial against the third, appeared to have been drawn by William Austin, *Samuel* Strobell, and William *Shirtliff*, the variance was held to be fatal. In this case, no evidence was given to prove the identity of the parties (*h*). * But where the declaration was against *Thomas Ray* and others, as the joint makers of a note, and Thomas Ray suffered judgment by default, and the note was proved to have been signed by J. Hodgson for Rowes, J. Hodgson, *Rey & Co.*, and the real name of the partner was *John Rey*, it was objected that Thomas Ray the party sued was not a partner; but proof being given that *John Rey*, the party intended to be sued, had actually been served with process, and was a co-partner with the other defendants, the variance in the christian names was held to be immaterial, and the variance in the surnames Kay and Key was held to be immaterial, their pronunciation being similar (*i*).

Where an action was brought by Willis, as the payee of a note, and on production the note was payable to Willison, evidence was admitted on the part of the plaintiff to show that she was the party really meant, and to explain the mistake (*k*).

- * 243 * A declaration alleging a note to have been made by *A.* and *B.* is not satisfied by evidence of a note given by *A.*

(*f*) See tit. *Variance*; and see *Boughton v. Frere*, 3 Camp. 29. *Mayor, &c. of Stafford v. Bolton*, 1 B. & P. 40. The general rule seems to be, that if the identity of the parties be proved, a variance in their names is immaterial. [See Mr. Howe's note to *Boughton v. Frere*, 3 Camp. 30.]

(*g*) *Whitwell v. Bennett*, 3 B. & P. 559.

(*h*) *Gordon v. Austin*, 4 T. R. 611.

(*i*) *Dickenson v. Bowes*, 16 East, 110. A description of the plaintiffs as executors and trustees of *A. B.* is mere surplusage; the bill being payable to them in the name of a firm which they had assumed, *Agutter v. Moses*, 2 Starkie's C. 499. If presentment be alleged to have been made when the bill was due and payable, the day alleged under a *vide licet* will not be material, although it be on a Sunday. *Bynner v. Russel*, 1 Bing. 23.

(*k*) *Willis v. Barrett*, 2 Starkie's C. 29. Note, the declaration alleged a promise to pay Willis, by the name of Willison. As to the

alone, to secure a partnership debt (l); but it would be otherwise if A. prefixed to his signature, "for A. and B." (m). Proof that others joined with the defendants in drawing, accepting, or indorsing the bill, is immaterial under the general issue, but is pleadable in abatement (n).

PART
IV.

Variance in parties to the bill.

An undertaking to provide for the acceptance of a bill is not a promissory note (o).

An allegation that a bill is payable to A., is proved by a bill payable to the order of A. (p).

It is essential that the bill read in evidence should agree in legal effect, as well as in words, with that specified in the declaration; (1) and therefore, where the bill proved was drawn in Dublin for payment in currency, but there was nothing in the declaration to show that Irish currency was meant, the variance was held to be fatal (q). The omission of the word sterling is immaterial (r). Where the variance arises in consequence of any artifice in framing the bill, as by the introduction of some words in small characters, or by the use of illegible marks (s) * for the purpose of deceit, the variance is also immaterial (t).

In legal effect,

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Where the declaration was on a bill of exchange, and the instrument given in evidence contained the word *at*, inserted before the drawee's name, it was held that it was no variance (u).

Variance in legal effect.

An allegation that the bill was subscribed by the proper hand of the drawer must (it seems) be supported by evidence of his hand-writing (x).

Allegation of signature.

admissibility of parol evidence to remove a latent ambiguity, see tit. *Parol Evidence*.

(l) 2 Camp. 308. 15 East, 7.

(m) 1 Camp. 403.

(n) *Mountstephen v. Brooke*, 1 B. & A. 224. And see *Richards v. Heather*, 1 B. & A. 29; and *Evans v. Lewis*, 1 Will. Saund. 291, d. n.

(o) Peake's C. 24, *Scholey v. Walsby*.

(p) *Smith v. Maclure*, 5 East, 476.

(q) *Kearney v. King*, 2 B. & A. 201.

(r) *Ibid*.

(s) *Allan v. Maason*, 4 Camp. 115.

(t) Where the word *at* was inserted before the drawer's name, the instrument was held to have been properly described as a bill of exchange. *Shuttleworth v. Stevens*, 1 Camp. 407.

(u) Dougl. 651.

(x) *Tamen qu*. Where the declaration alleged their own proper hands being thereunto subscribed, and it appeared that the bill was subscribed by one in the name of the firm, it was doubted whether the variance was fatal. 2 Camp. 305, & vide *supra*, 228.

(1) [See Ante, p. 84, note (1).]

PART IV.	An allegation that the bill was directed to the defendant, is not supported by proof of a bill drawn payable to the drawer's order at a certain place named, although the defendant, when it was presented there, wrote his name upon it as the acceptor (y).
Direction.	
Consideration.	Where the allegation was, that the bill was for value <i>received</i> in leather, and the evidence was, that it was for value <i>delivered</i> in leather, it was held to be no variance (z); but if the bill be drawn in the usual form for value received, (which means by the <i>drawer</i>), and the declaration allege it as value received by <i>the drawee</i> , the variance is material (a).
Delivery.	It seems, that an allegation of the delivery of the bill to the payee may be rejected as surplusage (b).
* 245	If the acceptance of the bill be unnecessarily alleged * in an action against the drawer, it must be proved as laid (c).
Variance.	Where the writing of the drawee upon the bill is not legible, it has been doubted whether it is to be considered as an accepted or as a defaced bill (d).
Indorsements.	Indorsements unnecessarily alleged must be proved (e). If there be no date to the indorsement, a variance from the allegation, that the bill was indorsed before it became due, will not be material (f).
Presentment.	Upon a declaration against B. as an indorser of the bill, it appeared in evidence that the bill had been indorsed to B. in blank, and that B. without writing his own name, had converted the blank indorsement into a special indorsement to the plaintiff, and it was held that B. was not liable as indorser (g). Although the declaration allege a presentment by a person specified, it is sufficient to prove a presentment by another (h). A variance as to the time of presentment and acceptance is not material, even although the bill be payable after sight (i).

(y) *Gray v. Milner*, 2 Starkie's C. 336.

(z) Bayley, 16, n. *Jones v. Mars*, 2 Camp. 305.

(a) *Highmore v. Primrose*, 5 M. & S. 65.

(b) *Smith v. Maclure*, 5 East, 476. 7 T. R. 596.

(c) 2 Camp. 474.

(d) Bayley, 88. Chitty, 204, n. 9. 6 East, 199. 1 Taunt. 420.

(e) *Waynam v. Bend*, 1 Camp. 175. *R. v. Stevens*, 5 East, 244. *Williamson v. Allison*, 2 East, 446. *Peppin v. Solomon*, 5 T. R. 496.

(f) *Young v. Wright*, 1 Camp. 139.

(g) *Vincent v. Horlock*, 1 Camp. 442.

(h) *Boehm v. Campbell*, 1 Gow's C. 55.

(i) *Forman v. Jacob*, 1 Starkie's C. 46.

The *indorsee* of a note or bill, in an action against the *maker or acceptor*, must prove, 1st, the *making* of the note, or the *drawing and acceptance* of the bill by the defendant. 2dly, *presentment*, where necessary. These proofs, and the effect of variance, have been already stated. 3dly, he must prove his own *title* to it by *transfer*; and 4thly, in some instances, must show that he gave *value* for it.

PART
IV.Indorsee v.
maker or ac-
ceptor.

* 3dly. His title to the bill.—In the first place it must appear from the bill itself that it is a *negotiable* instrument, which is a pure question of law (*k*); and next he must prove that the bill or note has been transferred to him.

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Title by trans-
fer.

Where the bill or note is not payable to the bearer, but to a particular person, or to his order, an indorsement *in writing* made by that person, or by his authority, is essential to the transfer; and therefore evidence of that person's hand-writing, or of another person proved to be his authorized agent, is essential to prove the transfer (*l*).

Transfer by
indorsement.

* Where all the indorsements through which the plaintiff claims are special, they must all be alleged and proved by evidence of the hand-writing of the different indorsers, or of admissions on the part of the defendant (*m*).

* 247

Indorsement.

(*k*) 3 Burr. 1523. 1526. 1528. But see *Grant v. Vaughan*, 3 Burr. 1516, where Ld. Mansfield left this question to the jury. (*Vid. infra*, tit. *Custom*.) A bill or note payable on a contingency cannot be declared on as a negotiable instrument (*Haussoullier v. Hartsincke*, 7 T. R. 733. *Collis v. Emmett*, 1 H. B. 313. *Hill v. Halford*, 2 B. & P. 413. *Blanckenhagen v. Blundell*, 2 B. & A. 417. See *Trier v. Bridgman*, 2 East, 359. *Carlos v. Fancourt*, 5 T. R. 482. *Coleman v. Cooke*, Willes, 393). An instrument acknowledging the receipt of an acceptance, and containing an undertaking to provide for it, is not a promissory note, and requires a receipt stamp (*Scholey v. Walsby*, Peake's C. 24. See *Williamson v. Bennett*, 2 Camp. 417; also *Leeds v. Lancashire*, Ante, p. 77, in the note). If a note, before it is signed, be indorsed with a memorandum that it shall be void on the happening of a contingent event, it is not within the stat. 3 & 4 Ann. c. 9 (*Hartley v. Wilkinson*, 4 Camp. 127). But a defeazance indorsed by the payee on the instrument is no part of the contract, unless proved to have been made at the same time (*Stone v. Metcalf*, 1 Starkie's C. 53). *I promise to pay*, signed by two persons, is a joint and several note (*Marsh v. Ward*, Peake's C. 130.) [*Hunt v. Adams*, 6 Mass. Rep. 519. acc.] A note payable to *A.* only, without the words, *bearer or order*, is a valid note (*Smith v. Kendal*, 1 Esp. C. 231. 6 T. R. 123. *Burchell v. Slocock*, 2 Ld. Raym. 1545. *Moor v. Paine*, C. T. Hard. 288). A request to pay 15*l.* out of half-pay which will become due in January, is not a promissory note. (*Stevens v. Hill*, 5 Esp. 247.) And see *Evans v. Underwood*, 1 Wils. 262. *Jenny v. Herle*, 2 Ld. Raym. 1362. 1 Str. 591. *Josselyn v. L'Acier*, 10 Mod. 294. 316.

(*l*) *Skinn.* 411. 1 Atk. 282. 2 Burr. 674. 3 East, 482.

(*m*) See *Sidford v. Chambers*, 1 Starkie's C. 326.

PART
IV.

Where the first, or any subsequent indorsement, is made in blank, the indorsee may claim immediately under that indorsement, although after the blank indorsement there be one or more special indorsements (*n*). Where, however, the intermediate indorsements are alleged in the declaration, they must all be proved (*o*), even although they were upon the bill at the time of acceptance (*p*). The hand-writing of the first indorser must be proved, although he was the drawer (*q*), and although his name was on the bill at the time of acceptance (*r*); and therefore the indorsee of a bill payable to a fictitious payee cannot recover against the acceptor, unless he can prove that the acceptor knew that the payee was fictitious, or that the money found its way into his hands (*s*).

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Proof of trans-
fer.

* Proof that the indorsement is in the hand-writing of another person of the same name with the payee is not sufficient, for it is a forgery, and a title to the bill cannot be derived through the medium of forgery (*t*). Neither can an indorsee recover where it appears that the first indorsement (through which he must derive his title) was made upon an usurious consideration (*u*).

Indorsement
by a bankrupt.

An indorsement by a trader after his bankruptcy is good, if he has received value (*x*). An accommodation

(*n*) 1 B. & P. 658. 4 Esp. C. 210. 1 Esp. C. 180. *Smith v. Clarke*, Peake's C. 225. Bayley, 48.

(*o*) 1 T. R. 654. 6 Esp. 43.

(*p*) 1 T. R. 654. 6 Esp. 43. In *Jones v. Radford*, 1 Camp. 83, Ld. Ellenborough is stated to have held, that an indorsement in such a case by one person in the name of himself and a supposed partner, was evidence against the acceptor after the indorsement, to prove the partnership, which was disputed at the trial; this, however, cannot be supported without going the full length of contending that the acceptance operates as an admission of the regularity of the indorsement altogether. See *Carvick v. Vickery*, Doug. 653. *n*.

(*q*) *Macpherson v. Thoyles*, Peake's C. 20. Doug. 650, 653.

(*r*) 6 Esp. 43. 1 T. R. 654. Doug. 633. Peake's C. 225. 3 T. R. 175, 176. 4 T. R. 28.

(*s*) 1 Camp. 130. 3 Bro. 238. Co. B. L. 184, 5. 1 H. B. 313. 569. 625. Cullen, 98. *Gibson v. Minet & another*, 3 T. R. 481. 2 H. B. 187. 211. The plaintiff in such case may declare as on a bill payable to the bearer (3 T. R. 481. 1 H. B. 569. 625. 2 H. B. 187. 211. 288. 298;) or, *semble*, as on a bill payable to the order of the drawer, or on a count stating the special circumstances. *Ibid*.

(*t*) *Mead v. Young*, 4 T. R. 28, by three Justices, Ld. Kenyon, C. J. *dissentiente*.

(*u*) *Lowe v. Mazzaredo*, 1 Starkie's C. 385.

(*x*) *Smith v. Pickering*, Peake's C. 50. *Qu.* as to the indorsement of a bill by one partner after the bankruptcy of his co-partner. *Ramsbottom v. Cator*, 1 Starkie's C. 228.

bill, payable to the order of the drawer, does not pass to the assignees, and therefore an indorsement for value after the bankruptcy will confer a right of action (*y*). Where the bill was payable to a person deceased, the plaintiff may derive a title to it by proof of an indorsement by his executor or administrator (*z*). Where the bill is payable to *B.*, or order, for the use of *C.*, and *B.* indorses to *D.* for value, *D.* may recover on the bill, since *B.* had the legal interest, and *C.* but an equitable interest in the bill (*a*).

PART
IV.

Proof of trans-
fer.

By an execu-
tor.

Trustee.

If the property in the bill vest in a feme sole, who marries, the plaintiff must prove an indorsement by the husband (*b*), even although the husband permit * her to trade as a feme sole (*d*); but where she indorses in the name of the husband, the jury may, in some instances, presume, from the particular circumstances of the case, that she was the authorized agent of the husband (*e*); and where a note was made payable to Mrs. Carter, and she indorsed it in that name, and in an action by an indorsee against the maker, the latter proved that she was the wife of Cole, and it was proved that when the note was presented to the defendant for payment, he had promised to pay it, it was left to the jury to presume, that the wife had authority from the husband to endorse the note in the name by which she was known to the world (*f*). It is no defence to an action against the acceptor, that an indorsement essential to the plaintiff's title was made by an infant (*g*) (1).

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Indorsement
by a wife.

By an infant.

(*y*) 1 Camp. 46. 3 East, 321. 12 East, 656.

(*z*) 3 Wilson, 4. See tit. *Executor*.

(*a*) *Evans v. Cranlington*, Carth. 5. See 2 Vent. 307.

(*b*) *Connor v. Martin*, Str. 516. cited 3 Wils. 5. *Miles v. Williams*, 10 Mod. 160. 243.

(*d*) *Barlow v. Bishop*, 1 East, 432.

(*e*) Ibid. *Vide supra*, tit. *Agent*, 57.

(*f*) *Cotes v. Davis*, 1 Camp. 485.

(*g*) *Taylor v. Croker*, 4 Esp. 187. Bayley, 58. Although he was the payee of the bill (*Jones v. Darch & others*, 4 Price, 300). Note, in that case the defendant knew that the payee, who had indorsed the bill before acceptance, was an infant. See *Williams v. Harrison*, Carth. 140.

(1) [An infant may indorse a negotiable note made payable to himself, so as to transfer the property therein to the indorsee, for a valuable consideration. *Nightingale v. Withington*, 15 Mass. Rep. 273.]

PART
IV.

An admission by an indorser of his indorsement, is not, it seems, evidence against the acceptor (*a*).

Proof of transfer.

An averment that the payee by his indorsement directed the amount of the bill to be paid to *A. B.*, is satisfied by proof of an indorsement directing the payment to the order of *A. B.* for the payment to his order is in effect a payment to him (*b*); and, conversely, an indorsement directing the payment to be made to *A. B.*, may be alleged * 250 as a direction to pay to *A. B.* * or order (*c*), since that is the legal import of the indorsement.

A special indorsement of a bill contains in itself an absolute transfer of a bill (*i*); but an indorsement in blank is mere *prima facie* evidence of transfer (*k*); and therefore if *A.* the payee of a bill, indorse it in blank, and *B.* get the bill accepted, *A.* may still maintain an action on the bill, for *B.* might act either as agent or assignee, and not having filled up the indorsement, and thereby made the bill payable to himself, it is to be presumed that he acted as agent (*l*).

By delivery.

Where the bill or note is payable to the bearer, or has been indorsed in blank, *possession* is *prima facie* evidence of delivery (*m*) and ownership (*n*). Consequently, where several sue as the indorsees of a bill indorsed in blank, they are not bound to prove, either that they are partners, or that the bill has been indorsed to them jointly (*o*); but where a bill specially indorsed to *K.*, was by his direction indorsed in blank, and delivered to *L. & Co.*, it was held that two of the firm of *L. & Co.* could not conjointly with a stranger support an action as indorsees of the bill, without some proof of transfer by *L. & Co.* to the plaintiffs, either by indorsement or delivery (*p*).

(*a*) *Hemmings v. Robinson*, Barnes, 436. Bayley, 223. But see 2 Esp. C. 647, 8. The signature of a party may, it has been said, be proved by an admission which would be evidence against the party who made it. 2 T. R. 613. 1 Esp. 60. 4 Esp. 226.

(*b*) *Smith v. McClure*, 5 East, 476. *Fisher v. Pomfret*, Carth. 403.

(*c*) Str. 557. *More v. Manning*, Com. Rep. 311. *Eddie v. East India Company*, 2 Burr. 1216. 1 Bl. R. 295. S. C.

(*i*) *Pothier, Contrat du Change*, Part I, c. 2, s. 23, 24.

(*k*) *Smith v. Pickering*, Peake's C. 50. *Clarke v. Pigot*, 1 Salk. 126. 130.

(*l*) *Clarke v. Pigot*, 1 Salk. 126. 12 Mod. 192. S. C.

(*m*) The property in bills is not transferred by mere indorsement, without delivery, which must be averred. *R. v. Lambton & others*, 5 Price, 442.

(*n*) *Ord v. Portal*, 3 Camp. 239. *King v. Milsom*, 2 Camp. 5.

(*o*) *Ord v. Portal*, 3 Camp. 239.

(*p*) *Machell v. Kinnear*, 1 Starkie's C. 496.

Where an indorsee of a bill recovered against a prior indorser (also an indorsee of the bill), who then brought an action against the acceptor, he was non-suited *for want of a receipt for the money paid by him to the indorsee (q); but it would have been sufficient to show that he had paid the money.

PART
IV.

Proof of trans-
fer.
* 251

Where a note was given by A. to B. to secure a debt, and was assigned by B. to C. with directions not to negotiate it, as he should want it for the purpose of settling with A.; it was held that C. could not, after a settlement between A. and B., and without a redelivery of the note, maintain an action against A. (r).

Where the bill or note is payable to A. and B., who are not partners, the indorsement of both must be proved (s).

An indorsement by one of several partners in the partnership name will be sufficient, if the partnership be proved, since an authority may be implied (t). By partners.

(q) *Mendez v. Carreroon*, 1 Ld. Raym. 742. But this was on proof of a custom amongst merchants to produce a receipt for the money so paid; and Ld. Holt held that it would have been sufficient to prove that he had paid the money. In the above case (the record has been consulted) the plaintiff did not declare on the bill as indorsee, but specially alleged his payment of the money to the subsequent indorsee, on the default of the acceptor. Where, however, an indorser has been compelled by a subsequent indorsee to take up the bill, he may still sue as indorsee of the bill against the prior parties. See *Death v. Serwonters*, 1 Lut. 886; and the observations of Lawrence, J. in *Cowley v. Dunlop*, 7 T. R. 571, who considered the point as settled by the case of *Death v. Serwonters*, that the right to sue as indorser was not lost by indorsement, the bill being returned to the indorser; and therefore that if A. indorsed to B., and B. to C., and C. to D., who returned the bill to C., the latter might recover as indorsee of the bill. And see *Callow v. Lawrence*, 3 M. & S. 97, & *infra*; and where he declares upon the bill as indorsee, proof of payment does not seem to be essential, unless perhaps where the plaintiff has indorsed the bill specially.

(r) 1 Bos. & Pull. 398.

(s) *Carnick v. Vickery*, Doug. 653. n. Bayley, 55.

(t) *Supra*, 229, n. (k). So if one partner transfer in the name formerly used by the partnership, *Williamson v. Johnson*, 1 B. & C. 147; 2 D. & R. 281. Where the plaintiff claimed through the indorsement of E. S. the payee of the bill, and proved, that a person calling himself E. S. came to Cadiz, having the bill in his possession, and also a letter of introduction, proved to be genuine, which purported to be given to a person introduced to the writer as E. S., and also another bill of exchange drawn by the writer; and also, that that person resided at Cadiz ten days, during which time he visited the plaintiff, and indorsed the bill to him, and received a letter of credit from him, held, that this was evidence of identity, sufficient to warrant a verdict for the plaintiff, *Bulkeley v. Butler*, 2 B. & C. 434; see *Mead v. Young*, 4 T. R. 28.

PART
IV.

Evidence of an offer by the defendant to give another bill supersedes the proof of an indorsement (*u*).

* 252 *Proof of value.* * 4thly *Value*.—The holder of a bill indorsed in blank, or payable to bearer, is not prejudiced by a defect in the title without his knowledge, but he must in general, in such case, prove that he has given *value* for the bill; and therefore it is no defence to an action on a bill or note to prove that it was *lost* by the owner, or *stolen* from him, provided the plaintiff can show that he gave a valuable consideration for it (*x*). So if the bill has been extorted by duress, the plaintiff must prove that he gave some value for it (*y*). So where the bill has been obtained from the drawer by fraud (*z*); but the defendant may defeat the holder's claim by proof that he had *notice* of the defect (*a*).

* 253 Bankers who have given acceptances for a customer beyond the cash balance in their hands, hold all collateral securities for value (*b*), and may recover against an accommodation acceptor, although the customer who had previously deposited the bill with them, had it in his hands when it became due, and had agreed to deliver it up for a valuable consideration, instead of which he redelivered it to the plaintiffs (*c*). So, although they had delivered it to the payee when it became due to procure * payment, and it remained in his hands till his bankruptcy, and then passed into the hands of his assignee (*d*).

Value.
Effect of notice.

An acceptor cannot, by mere notice to the plaintiff, and without throwing suspicion on his title, compel him to

(*u*) *Bosanquet v. Anderson*, 6 Esp. C. 43; 1 T. R. 654, & *infra*.

(*x*) *Miller v. Race*, 1 Burr. 452. *Lawson v. Weston*, 4 Esp. 56. *Grant v. Vaughan*, 3 Burr. 1516. 1 Bl. R. 485. 2 Show. 235. 1 Salk. 126. *Anon.* 1 Ld. Raym. 738. *Peacock v. Rhodes*, Doug. 632. *Paterson v. Hardacre*, 4 Taunt. 114. So bank-notes cannot be followed by the legal owners into the hands of *bona fide* holders for a valuable consideration, without notice; and therefore where a trader, after bankruptcy and a commission, procured bank-notes in exchange for bills, and by these bank-notes, through an agent unknown to the defendants (bankers), redeemed a bill of exchange in their hands, it was held that the assignees could not recover. *Lowndes v. Anderson*, 13 East, 130. See also *Solomons v. The Bank of England*, 13 East, 135, *n.*; and tit. *Bankrupt*.

(*y*) *Duncan v. Scott*, 1 Camp. 100.

(*z*) *Rees v. Marquis of Headfort*, 2 Camp. 574.

(*a*) See the cases above cited, note (*x*).

(*b*) *Bosanquet v. Dudman*, 1 Starkie's C. 1.

(*c*) *Ibid.*

(*d*) *Bruce v. Hurly*, 1 Starkie's C. 23.

prove *value* (e) (1). According to the practice of the Court of Common Pleas, the defendant must give notice of his intention to call upon the plaintiff to prove that he gave value for the bill (f). In the King's Bench it is not necessary to give such notice, although it is usual, and proper to do so. Whether such notice has or has not been given according to the present practice (g), the plaintiff is not bound to enter upon proof of consideration as part of his original case, or until suspicion has been cast upon his title, either upon cross-examination of his witnesses, or by proof on the part of the defendant (h).

II. The liability is of a secondary and conditional nature, and consequent upon the default of the maker of a note or acceptor of a bill, that is, where the action is brought. Secondary liability.

1st. By the payee against the drawer of a bill. 2dly. By an indorsee against the drawer or indorser of a bill, or against the indorser of a promissory note. Payee against the drawer.

1st. By the payee against the drawer of a bill; here the plaintiff must prove (i), 1st. The drawing of the bill. 2dly. Due presentment. 3dly. The drawee's or * acceptor's default. 4thly. Notice, or facts which excuse the want of notice, to the drawer; and in some cases, 5thly. A protest.— * 254

1st. The drawing of the bill is usually established by proof of the drawer's hand-writing, or by proof of the drawing in his name by an authorized agent. Where there are several drawers, it must be proved that they all signed the bill, or gave authority for the drawing of it in their joint names (k). Drawing of the bill.

2dly. Presentment.—As the liability of the drawer or indorser is of a secondary nature only, (for he undertakes Proof of presentment.

(e) *Reynolds v. Chettle*, 2 Camp. 596.

(f) *Paterson v. Hardacre*, 4 Taunt. 114.

(g) A contrary course was adopted by Ld. Ellenborough (*Delaney v. Mitchell*, 1 Starkie's C. 439); but the present practice appears to be more convenient, since it frequently happens that the defendant is unable to impeach the plaintiff's title, and then the proof of consideration becomes unnecessary.

(h) *Reynolds v. Chettle*, 2 Camp. 596. *Paterson v. Hardacre*, 4 Taunt. 114. *Humbert v. Ruding*, Chitty on Bills, 512.

(i) As to the production of the bill, *vide supra*, 227.

(k) *Vide supra*, Proof of acceptance, p. 229.

(1) [An indorsement is *prima facie* evidence of having been made for full value, and it is incumbent on the other party to show it to be otherwise. *Riddle v. Mandeville*, 5 Cranch, 332.]

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IV.Proof of pre-
sentment.

to pay the amount upon the default of the maker or acceptor,) it is necessary to aver and prove that due diligence has been used for the purpose of procuring payment from the maker or acceptor (*l*); and hence it is to be observed, that an allegation of due presentment, and a refusal to pay, will not be satisfied by evidence that the maker or acceptor could not be found when the note or bill was due (*m*).

For payment.

A presentment may be either for acceptance or payment. Where the bill is payable at a certain date, a presentment for payment must be proved to have been made on the last day of grace, whether the bill be an inland or foreign one (*n*).

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A bill payable at a banker's must be presented within the usual banking-hours (*o*); but where the bill is payable * at the house of a private tradesman, the presentment need not be made within banking hours. In such case it has been held, that a presentment at eight in the evening is not unseasonable (*p*); and a presentment at any time in the day or evening is sufficient, if an answer be given by an authorized person (*q*).

Time of.

Where the bill is payable at *sight*, or within a certain time after, it must be presented within a *reasonable* time (*r*).

No precise rule has been laid down defining the limits allowed for presentment in such cases, the Courts having cautiously avoided the fixing any certain time, even in respect of an inland bill; and it has been said, that no precise rule can be laid down upon the subject (*s*). The ques-

(*l*) 2 Burr. 677. 2 H. B. 565. [*Berry v. Robinson*, 9 Johns. 121.]

(*m*) *Leeson v. Pigott*, cited Bayley, 187.

(*n*) 4 T. R. 152. *Tassel v. Lewis*, Ld. Ray. 743. *Anderton v. Beck*, 16 East, 248. Days of grace are not allowed where the bill is payable on demand (*Chitty*, 146). A cheque received on one day should be presented for payment on the next day. 2 Camp. 537.

(*o*) *Parker v. Gordon*, 7 East, 385. *Elford v. Teed*, 1 M. & S. 28. And it will not be inferred from the circumstance of the bill being presented by a notary, that it had before been duly presented within banking-hours. *Ibid*.

(*p*) 2 Camp. 527.

(*q*) *Garnett v. Woodcock*, 1 Starkie's C. 475. See also *Henry v. Lee*, 2 Chit. Rep. 124.

(*r*) *Muilman v. D'Eguino*, 2 H. B. 565. And see *Darbiskire v. Parker*, 6 East, 3. 2 H. B. 565. See *Fry v. Hill*, 7 Taunt. 397. *Semble*, presentment on the fourth day in London, when drawn at the distance of twenty miles from London, is within a reasonable time. *Ibid*. And see *Goupy v. Harden*, 7 Taunt. 159.

(*s*) Per Eyre, C. J. in *Muilman v. D'Eguino*, 2 H. B. 565; and per Heath, J. and Gibbs, C. J. *Goupy v. Harden*, 7 Taunt. 159.

tion of reasonable time in this, as in all other cases, appears to be a mixt question of law and of fact (*t*); but in the late case of *Fry v. Hill*, the Court seem to have considered it to be a question for the jury (1). It has been held, however, that a plaintiff is not guilty of laches in sending a foreign bill, payable after sight, into circulation before acceptance (*u*); and in keeping it in circulation without acceptance, so long as the respective holders found convenient.

A cheque payable on demand need not be presented

(*t*) *Darbishire v. Parker*, 6 East, 3. See the rule, *infra*, p. 258.

(*u*) *Goupy v. Harden*, 7 Taunt. 159. S. C. 2 Marsh. 454, in an action by the indorsee against the indorser; and in *Muilman v. D'Eguino*, 2 H. B. 565.

(1) [In *Atwood v. Clark*, 2 Greenleaf, 249, Mellen, C. J. says, "what is a reasonable time, within which an act is to be performed, when a contract is silent on the subject, is a question of law." S. P. *Ellis v. Paige*, 1 Pick. 43. In cases of bills of exchange and notes, the reasonableness of demand and notice is now considered, in New Hampshire, as a mere question of law, though until recently it was otherwise. *Haddock v. Murray*, 1 N. Hamp. Rep. 140. When the facts are agreed on or proved, it is a question of law whether demand, notice, &c. are within a reasonable time. *Furman v. Haskin*, 2 Caines' Rep. 369. *Bryden v. Bryden*, 11 Johns. 188. *Whitwell & al. v. Johnson*, 17 Mass. Rep. 453. In Pennsylvania, it is said in several cases, that what constitutes reasonable notice is matter of fact for the jury to determine. *Robertson v. Vogle*, 1 Dallas, 255. *Mallory v. Kirwan*, 2 Dallas, 192. *Warder v. Carson's*, Exors. *ibid.* 233. 1 Yeates, 531. *Ball v. Dennison*, 4 Dallas, 165. *Bank of North America v. Pettit*, *ibid.* 129. In one case, however. *McKean*, C. J. says, what is reasonable notice, where the parties live in the same city, or near to each other, is now settled to be matter of law, though the strictness required in England has not obtained in Pennsylvania. *Bank of N. America v. McKnight*, 1 Yeates, 147.

In New Jersey, the question whether reasonableness of notice is to be decided by the court or by the jury seems not to be settled, *Ferris v. Saxton*, 1 Southard's Rep. 1. In Maryland, the court decide this question. *Philips v. M'Curdy*, 1 Har. & J. 187.

The strict rule of the English law respecting non-payment of bills has not prevailed in North Carolina. What shall be reasonable notice depends on the local situation and respective occupations and pursuits of the parties—of which it seems the court are to judge. *London v. Howard*, 2 Hayw. 332. *Austin v. Rodman*, 1 Hawks, 195.

In Kentucky, reasonable diligence in giving notice, &c. is matter of law to be decided by the court. *Dodge v. Bank of Kentucky*, 2 Marsh. 616. *Noble v. Bank of Kentucky*, 3 Marsh. 264.

See *Taylor v. Bryden*, 8 Johns. 173, and *Field v. Nickerson*, 13 Mass. Rep. 131, where the question of reasonable notice seems to have been considered as a mixed question of law and fact.

See on this subject, Ante, Vol. I. p. 414 to 425.]

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* till the day after that on which it is given, it is sufficient to send it for presentment by the next day's post (*x*).

If a holder of a bill payable after sight keep it without either presenting it or putting it into circulation, he is guilty of laches, and cannot recover (*y*).

Presentment,
where.

Proof of presentment of a bill to a banker's clerk at the clearing-house, is sufficient (*z*). If the bill has been accepted by the agent of the drawee, who is abroad, it must be presented to that agent for payment (*a*).

If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker (*b*). Where a note was made payable at the house of *C.*, who was the banker of *A.*, and in the course of business was indorsed to *C.*, it was held that it was unnecessary to make any demand upon the maker (*c*). If the maker or acceptor be dead, the note or bill should be presented to his representative, if he lives within a reasonable distance (*d*) (1).

Proof of
default.

3dly. The *default* of the drawee or acceptor.—Where a bill is payable so many days after sight, the plaintiff must prove a presentment for acceptance (*e*). But in other cases it is sufficient to prove a presentment for payment when

(*x*) 7 Taunt. 397; and see the rule *Williams v. Smith*, 2 B. & A. 497, & *infra*, p. 258.

(*y*) 2 H. B. 565.

(*z*) 2 Camp. 596.

(*a*) *Phillips v. Astling & others*, 2 Taunt. 206.

(*b*) *Saunderson v. Judge*, 2 H. B. 509. *Bowes v. Howe*, 5 Taunt. 30.

(*c*) *Saunderson v. Judge*, 2 H. B. 509. In that case the note was made payable at the banker's merely by means of a memorandum indorsed at the foot; and the court were of opinion that the averment of a presentment according to that note was unnecessary.

(*d*) Bayley, 95.

(*e*) Chitty, 122.

(1) [So if the indorser of a note be dead at the time it becomes payable, and there are executors or administrators known to the holder, notice of non-payment must be given to them. *Merchant's Bank v. Birch's Exors.* 17 Johns. 25. But where a note fell due the 22d December, and the indorser died at sea on the 12th December, but his death was not known to the holder until March following, and the will was not proved, nor letters testamentary granted until April; it was held that a notice of non-payment left, at the time, at the dwelling house of the indorser, his last place of residence in New-York, and also sent to his family, who had, a short time before, removed into the country, was sufficient to support an action against the executors of the indorser, without showing notice to them of the non-payment, *ibid.* *S. P. Stewarts v. Eden's Exors.* 2 Caines' Rep. 121. See *Price v. Young*, 1 Nott & McCord, 438, *Hale v. Burr*, 12 Mass. Rep. 86.]

the bill becomes due, and a refusal to pay (*f*); but if a previous acceptance be unnecessarily *alleged, it seems that it must be proved (*g*). It is sufficient to prove a presentment for acceptance, and a refusal to accept at any time before the bill becomes due, for upon the dishonour the drawer becomes liable (*h*) immediately (1). It is also sufficient to show that the drawee refused to accept according to the form of the bill; and evidence is inadmissible for the purpose of proving that the mode of payment proposed would have been equivalent to a payment according to the terms of the bill (*i*). The plaintiff must prove that the refusal came from the defendant, it is not sufficient therefore to produce a witness who went to the drawee's residence, and was there told by *some one* that the bill would not be honoured (*k*).

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Proof of presentment and refusal.

4thly.—Notice to the drawer (*l*).—The general rule is that the plaintiff must prove that he has used due diligence in giving notice of the default; and whether due diligence has been used is a question of *law*, but dependent on facts, such as the situation of the parties, their places of abode, and the facility of communication (*m*) (2).

Notice.—General rule.

It is sufficient to prove that the defendant had due notice from any party to the bill (*n*) (3). If the drawer receive

By whom.

(*f*) B. N. P. 269. *Bright v. Purrier*, cited 3 East, 483. *Ballingalls v. Gloster*, 3 East, 481. See *Macarty v. Barrow*, 2 Str. 949.

(*g*) *Jones v. Morgan*, 2 Camp. 474. But a subsequent promise to pay would be evidence of an acceptance. *Ibid*.

(*h*) B. N. P. 269. *Bright v. Purrier*, cited 3 East, 483. *Ballingalls v. Gloster*, 3 East, 481. See *Macarty v. Barrow*, 2 Str. 949.

(*i*) *Boehm v. Garcias*, 1 Camp. 425. n.

(*k*) *Check v. Roper*, 5 Esp. C. 175.

(*l*) *Dalgleish v. Weatherby*, 2 Bl. R. 747.

* (*m*) Per Lawrence, J. *Darbishire v. Parker*, 6 East, 3. 2 Camp. 602. *Tindal v. Brown*, 1 T. R. 167. But see Ld Kenyon's opinion, *Hilton v. Shepherd*, 6 East, 14, n.; and see the rule, p. 258. Notice to the acceptor in an action against the drawer of a bill, payable at a particular place, is unnecessary, *Edwards v. Dick*, 4 B. & A. 212.

(*n*) 2 Camp. 177. *Rosher v. Kieran*, 4 Camp. 87. *Jameson v. Swinton*, 2 Camp. 373. *Wilson v. Swabey*, 1 Starkie's C. 74. But see *Ex parte Barclay*, 7 Ves. jun. 598; and *Tindal v. Brown*, 1 T.

(1) [*Sterry v. Robinson*, 1 Day, 11. *Watson & al. v. Loring & al.* 3 Mass. Rep. 557. *Lenox v. Cook*, 8 Mass. Rep. 400. *Mason v. Franklin*, 3 Johns. 202. *Weldon v. Buck*, 4 Johns. 144. *Taan v. Le Gauz*, 1 Yeates, 204. *Winthrop v. Pepon*, 1 Bay, 468. acc.]

(2) [See Ante, p. 255, note (1).]

(3) [Notice by the drawee, who has refused to accept the bill, is
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Proof of no-
tice.—
By whom.

Time of.

due notice from his own indorsee, he is liable * to a subsequent indorsee, from whom he received no direct notice (o).

Upon the guarantee of the price of goods to be paid for by bill, it was held that notice of dishonour should be given both to the drawer and to the party who guaranteed the payment, unless both were bankrupts (p)

Notice of dishonour may be given immediately on the refusal to pay, without waiting to see whether the bill will be taken up in the course of the day (q). The general rule as to time, is, that if the parties live in the same town, notice shall be given the next day; if in different places, by the next day's post (r) (1). Where the holder received

R. 167. In that case time had been given to the maker of the note. [See *Haslett v. Poultney*, 1 Nott & M'Cord, 466. *Brower v. Wooten*, 2 Taylor, 70. *Stafford v. Yates*, 18 Johns. 327.]

(o) *Jameson v. Swinton*, 2 Camp. 373.

(p) 2 Taunt. 206.

(q) 3 Camp. 193. And see *Wright v. Shawcross*, 2 B. & A. 501. n. [*Bussard v. Levering*, 6 Wheat. 102. *Shed v. Brett*, 1 Pick. 401. acc.]

(r) *Williams v. Smith*, 2 B. & A. 496, where the rule was laid down that notice of the dishonour of bills must be given, or presentment made, by the post on the day following that on which the party receives the bills, or notice of the dishonour; and the Court said, that if it were to be the next practicable post, difficult questions of fact would often be raised, and uncertainty would arise, from peculiar local situations. Where, therefore, country bank-notes were received on Friday, and transmitted partly by the Saturday and partly by the Sunday's post, so that both were received in London on Monday, and were presented on Tuesday and dishonoured, the Court held that the holder had not been guilty of laches, although he had received the notes several hours before the post went off on Friday (*Ibid.* And see *Tindal v. Brown*, 1 T. R. 167; *Puckford v. Maxwell*, 6 T. R. 52; and *Wright v. Shawcross*, 2 B. & A. 501). It has been doubted whether it is sufficient that the drawer should have had notice in as many days as there are intermediate indorsers between himself and the plaintiff. (*Marsh v. Maxwell*, 2 Camp. 210, n. Cor. *Ellenborough*, C. J. 1811, *negant.* *Cutler v. Boddy*, Chitty, 406, Cor. *Ellenborough*, C. J. 1814, *affirm.*) And a special case was afterwards reserved upon the point. *Turner v. Leach*, *ibid.* See *M'Queen v. Furquhar*, 11 Ves. 478. ; & *infra*, 269.

not sufficient—he not being a party or chargeable in virtue of the bill. *Stanton & al. v. Blossom & al.* 14 Mass. Rep. 116. Notice or demand, however, may be given or made by a notary. *Hartford Bank v. Stedman*, 3 Conn. Rep. 489. *Shed v. Brett*, 1 Pick. 401.]

(1) *Whitwell & al. v. Johnson*, 17 Mass. Rep. 453. *Shed v. Brett*, 1 Pick. 401. *Ireland v. Kip*, 11 Johns. 231. *Dodge v. Bank of Kentucky*, 2 Marsh. 616. *Robinson v. Ames*, 20 Johns. 146. acc. See post p. 269, note (1).]

notice of the dishonour on Sunday, notice by him by Tuesday's post was held to be sufficient (*s*). Where the dishonour was on Saturday *at nine, the notice to the plaintiff on Monday, at Knightsbridge, by his banker, and notice by the plaintiff to the indorsee in Tottenham-court-road on Tuesday, it was held to be sufficient (*t*). Notice by a letter put into the two-penny post-office after five o'clock in the afternoon of the day after that on which the party knew of the dishonour, was held to be insufficient (*u*); and where the letter, in the usual course, would reach the defendant on the evening of the day following that on which the bill was dishonoured, it was held to be sufficient, although the parties resided within a short distance of each other (*x*). Where notice was given to a Jewish indorser on the 8th, which was a great Jewish festival, it was held that it was not necessary for him to give notice by the general post till the 9th (*y*). Where the indorser, living in Holborn, gave notice to the indorsee living at Islington, by nine the next night, it was held to be reasonable notice (*z*).

Where a bill is dishonoured abroad, notice by the first *direct* and *regular* mode of conveyance, whether it be an English or a foreign ship, is sufficient; the holder is not bound to send such notice by the accidental, though earlier, conveyance, of a foreign ship (*a*).

It is not necessary to prove a notice in writing (*b*). It is sufficient to prove a reasonable endeavour to give notice,

(*s*) *Wright v. Shawcross*, 2 B. & A. 501. *n*.

(*t*) *Haynes v. Birks*, 3 B. & P. 599.

(*u*) 2 Camp. 208. Bayl. 125. *Scott v. Lifford*, 9 East, 347. And see *Langdale v. Trimmer*, 15 East, 291. [See post, p. 269, note (1).]

(*x*) 2 Camp. 633.

(*y*) *Ibid.* 602.

(*z*) 2 Taunt. 224. And see *Hilton v. Shepherd*, 6 East, 14, *n*. Where there were five indorsers, *A. B. C. D. E.* all living near London, notice of dishonour on the same day to *E.* and on the next to *D.*, was held to be sufficient. A bill is received by a traveller for the plaintiff, who transmits to his principal; the bill being dishonoured, the latter writes to his traveller to inquire from whom he received it, and on receiving the requisite information gives notice to the defendants, held to be sufficient, *Baldwin v. Richardson*, 1 B. & C. 245.

(*a*) *Muilman v. D'Eguino*, 2 H. B. 565.

(*b*) *Cross v. Smith*, 1 M. & S. 545.

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Proof of notice.—By the post.

by sending an agent to the drawer's country house, who used his endeavours to give the notice (c) (1).

* To prove a notice, it is sufficient to show that a letter, announcing the dishonour, and directed to the defendant, was put into the proper post-office (d) (2); or that such a letter was left at the defendant's house (e). Notice by a letter put into the two-penny post, has been deemed to be sufficient, although the parties lived within a short distance of each other (f); but it should appear that the letter was put into the receiving-house in sufficient time to be delivered to the party, according to the course of the post, within the time of legal notice (g). And in the case of a foreign bill also, the delivery of a letter at the post-office has been held to be sufficient evidence of notice (h). Where there is no post, it is sufficient to prove that notice was sent by the ordinary mode of conveyance (i) (3).

Where a bill was drawn in Jamaica in favour of A., who remained there after the dishonour of the bill, it was held

(c) As where such agent went to the drawer's counting-house on two successive days, during hours of business, knocked there, and made sufficient noise to be heard by persons within, and waited there several minutes, the inner door being locked. *Cross v. Smith*, 1 M. & S. 545.

(d) Pothier, 148. Bayl. 119. 2 H. Bl. 509. *Scott v. Lifford*, 9 East, 347. 1 Camp. 246.

(e) 1 Esp. C. 5. [*Smith v. Bank of Washington*, 5 Serg. & Rawle, 322. *Smedes v. Utica Bank*, 20 Johns. 372.]

(f) *Hilton v. Fairclough*, 2 Camp. 633. *Scott v. Lifford*, 9 East, 347. 1 Camp. 246.

(g) *Smith v. Mullett*, 2 Camp. 208. *Hilton v. Fairclough*, 2 Camp, 633.

(h) 2 H. Bla. 509. 6 East, 3. 9. 7 East, 385. 3 Esp. C. 54.

(i) Bayley, 128.

(1) [Going with a note to the maker's place of business, in business hours, to demand payment, and finding it shut, is tantamount to a personal demand. *Shed v. Brett & trustee*, 1 Pick. 413. So if a notary go to the maker's house, and find it shut up, and that he is out of town, it is a sufficient demand. *Ogden v. Cowley*, 2 Johns. 274. But in North Carolina, it is held that in such case, "some endeavour must be used to find the maker." *Sullivan v. Mitchell*, 1 Car. Law Repos. 482.]

(2) [See post, 269, note (1).]

(3) [In the *Bank of Logan v. Butler*, 3 Littell's Rep. 498, the court in Kentucky held that where an indorser lived in the country and not on a post road, a special messenger ought to be employed, or other means used to convey the notice with the same despatch and certainty as it would go between places where there are post offices. See post 269, note (1).]

that proof of notice of the dishonour, left at his residence in England was sufficient (*k*). Proof that the letter containing notice was delivered to the person in whose house the defendant lodged, for the defendant, and was next morning thrown into the plaintiff's house, was held to be presumptive evidence of notice (*l*). It is insufficient to prove that notice was * given on one of two days, where the notice on the latter day would not be in time; for the plaintiff is bound to show that he has given proper notice (*m*). It seems to be doubtful whether parol evidence of the contents of the letter announcing the dishonour is admissible, unless notice to produce the letter be first proved (*n*) (1); and therefore, unless duplicates of the notice have been written, and one of them served, notice should, as a matter of prudence, be given to produce the original.

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A notice is good although accompanied by an intimation that the holders had reason to believe that a friend of the acceptor's would take up the bill in a few days, and that they would hold the bill (to save expense), till the end of the week, unless they heard from the drawers to the contrary (*o*). No particular form of notice is requisite; the object in giving notice is to apprise the party that the holder intends to require payment from him, and to enable him to pursue his remedy against any other party who may in turn be liable to him (*p*).

Contents of
notices.

(*k*) 2 Esp. C. 511. [S. P. *Fisher v. Evans*, 5 Binney, 542.]

(*l*) *Stedman v. Gooch*, 1 Esp. 5.

(*m*) Per Ld. Ellenborough.

(*n*) In *Langdon v. Hulls*, 5 Esp. C. 157. *Shaw v. Markham*, Peake's C. 165, held to be necessary. In *Ackland v. Pearce*, 2 Camp. 601, Le Blanc, J. admitted secondary evidence without proof of notice. It is sufficient to prove a duplicate of the notice (*Philipson v. Chase*, 2 Camp. 110. *Roberts v. Bradshaw*, 1 Starkie's C. 48). Where it was proved that duplicate notices had been written, and that a letter had been sent to the drawer the same day, and that notice had been given to the defendant to produce this letter, it was held to be evidence of notice of dishonour (*ibid.* and afterwards by the court of K. B.) But in *Hetherington v. Kemp*, (4 Camp. 193), it is said to have been held, that it is not sufficient to show that notice was written by a merchant in his counting-house, and laid upon his table, from which, in the course of business, all letters would be carried to the post-office.

(*o*) *Forster v. Jurdison*, 16 East, 105.

(*p*) *Tindal v. Brown*, 1 T. R. 170. [*Reedy v. Seixas*, 2 Johns. Cas. 337.]

(1) [In *Lindenberg & al. v. Beall*, 6 Wheat. 104, it was held, that evidence of a letter having been put into the post office, giving notice of the dishonour of a bill, might be given to the jury, without giving notice to the defendant to produce the letter.]

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Where the bill has been drawn by several, who are partners, a notice to one is a notice to all (*q*).

* 262 * The plaintiff, in excuse of his laches in not giving notice, may prove that the drawer had no effects in the hands of the acceptor to answer the bill, either at the time of drawing, or when the bill became due (*r*); and an acceptor is competent to prove the fact (*s*); and a protest is unnecessary to charge the drawer of a foreign bill where the drawee had no effects of the drawer in his hands, although the drawer entertained reasonable expectations that the bill would be accepted (*t*) (1).

Proof of notice.
—Facts in
excuse.

(*q*) *Porthouse v. Parker*, 1 Camp. 82. [*Dodge v. Bank of Kentucky*, 2 Marsh. 616. Sed vide *Shepard v. Hawley*, 1 Conn. Rep. 367.]

(*r*) *Bickerdike v. Bollman*, 1 T. R. 405. *Rogers v. Stephens*, 2 T. R. 713. *Clegg v. Cotton*, 3 Bos. & Pull. 239. 242. Per Chambre, J., the ground of this rule is the fraud of the drawer. *Claridge v. Dalton*, 4 M. & S. 226.

(*s*) 1 Esp. R. 332. *Walwyn v. St. Quintin*, 2 Esp. R. 515.

(*t*) 2 Camp. 310, *Legge v. Thorpe*. S. C. 12 East, 171. 177.

(1) [Notice is not necessary when the drawee has no effects of the drawer. *Bond & al. v. Farnham*, 5 Mass. Rep. 170. *Hoffman v. Smith*, 1 Caines' Rep. 157. *Baker v. Gallagher*, Circuit Court, Oct. 1806. Wharton's Digest, 87. *Anon. v. Stanton*, 1 Hayw. 271. But it lies on the holder of a bill to prove that the drawer had no funds in the hands of the drawee, in order to excuse the want of notice. *Baxter v. Graves*, 2 Marsh. 152.

The drawer of a bill is entitled to notice of its dishonour, though the drawee is not indebted to him, either when the bill was drawn or fell due, if he had reasonable ground to believe that it would be honoured—and a written authority from the drawee to the drawer for the latter to draw is sufficient ground. *Austin v. Rodman*, 1 Hawks, 194. *S. P. Robinson v. Ames*, 20 Johns. 146.

If the drawer withdraw his funds from the drawee's hands, after the bill is drawn, he is still entitled to notice of the dishonour of the bill. *Edwards v. Moses*, 2 Nott & M'Cord, 433. So if his effects are attached by a trustee process before the bill is presented. *Stanton & al. v. Blossom & al.* 14 Mass. Rep. 116. See *Sutcliffe v. M'Dowell*, 2 Nott & M'Cord, 251. *Lalley v. Miller*, *ibid.* 257, n.

Insolvency of a party to a bill does not excuse the holder from giving notice of its dishonour. *May v. Coffin*, 4 Mass. Rep. 341. *Bond & al. v. Farnham*, 5 ib. 170. *Lenox v. Leverett*, 10 ib. 1. *Sullivan v. Mitchell*, 1 Car. Law Repos. 482. *Edwards v. Thayer*, 2 Bay, 217. *Buck v. Cotton*, 2 Conn. Rep. 126.

Where before a note became due, the indorser informed the holder that the maker had absconded, and requested a further time of payment, it was held that demand on the maker or notice to the indorser was unnecessary. *Leffingwell v. White*, 1 Johns. Cas. 99. If the maker has absconded, and is not to be found when the note falls due, a demand of payment is not necessary to charge the indorser. *Duncan v. McCullough*, 4 Serg. & Rawle, 480.

Where the drawer of a bill is partner of the house or firm, on

Deeds deposited by the drawer in the hands of the drawee, for the purpose of raising money, are not effects, it seems, for this purpose (u).

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Absence from home on account of the dangerous illness of the party's wife has been held to be no excuse for not giving notice (x) (1). Proof to excuse want of notice.

An acknowledgment by the drawer that the bill would come back to him, has been held to supersede the necessity of notice (y).

The declaration by the drawee when the bill is presented, as to the want of effects of the drawer in his hands, is evidence of the fact, because he is for that purpose the agent of the drawer; but a subsequent declaration is not admissible (z). The plaintiff may also show, in excuse for want of notice, that he was *ignorant of the drawer's place * 263 of abode, and that he has used due diligence to discover it (a).

In the case of *Phipson v. Kneller* (b), the drawer, a few days before the bill became due, stated to the holder that he had no regular place of residence, but that he would call and inquire whether the bill had been paid by the acceptor, and *Ld. Ellenborough* held that he was not entitled to notice of dishonour. The plaintiff cannot, however, go into general evidence to show that the defendant in the particular instance has suffered no prejudice from the want of notice, for this would lead to inquiries of too complicated and indefinite a nature (c). Where one of the drawers

(u) *Walwyn v. St. Quintin*, 1 B. & P. 651. And see *Legge v. Thorpe*, 12 East, 171.

(x) *Turner v. Leach*, Chitty, 275, Cor. *Ld. Ellenborough*, C. J. But see *Hilton v. Shepherd*, 6 East, 14. n.

(y) *Brett v. Levett*, 13 East, 213; but *qu.*

(z) *Prideaux v. Collier*, 2 Starkie's C. 57.

(a) *Phipson v. Kneller*, 1 Starkie's C. 116, & *infra*.

(b) 1 Starkie's C. 116. 4 Camp. 285.

(c) *Rogers v. Stephens*, 2 T. R. 718. *Dennis v. Morrice*, 3 Esp. C. 158.

whom it is drawn, it is not necessary for the holder to prove that notice of its dishonour was given to the drawer. *Gowan v. Jackson*, 20 Johns. 176. But in Connecticut, where a note was drawn by one partnership and indorsed by another, the acting partner in both being the same person, it was held that this did not excuse the want of due demand and notice. *Dwight v. Scovill*, 2 Conn. Rep. 654.]

(1) [The prevalence of a malignant fever in the place of the parties' residence was admitted to be a sufficient excuse for not giving notice until November of a protest for non-payment, made in September. *Tunno v. Lague*, 2 Johns. Cas. 1.]

PART

IV.

Proof in ex-
cuse of notice.
Protest.

is also the acceptor of the bill notice is unnecessary (*d*). But it is necessary where the party draws the bill with a *bona fide* reasonable expectation that he shall have assets in the hands of the drawee, having shipped goods on his own account, and which were on their way to the drawee, although the goods had not come to the hands of the drawee, when the bill was presented for acceptance (*e*). So, where acceptances were made on the faith of consignments of goods which had not been received, on the ground of fair mercantile agreements (*f*), or where there are fluctuating accounts between the drawer and drawee (*g*); or where at the time of drawing a foreign bill, the drawee has effects of the drawer in his hands, although they are taken out before the bill becomes due (*h*); or where the drawee has effects of the drawer in his hands at any time whilst the bill is running (*i*) (1).

It has been held, that notice is not dispensed with although the drawer and drawee have agreed that the former should take up the bill (*k*), or, although the drawer of a bill, destroyed by accident, refuse to give a new bill according to the statute (*l*), or although the drawee be a bankrupt or insolvent (*m*) (1); or although the drawee has previously informed the drawer of his inability to pay, and has paid him money towards the taking up the bill (*n*); or although the plaintiff be able to show that the drawer was not damnified by the want of notice (*o*) (2).

(*d*) 12 East, 317.

(*e*) *Rucker v. Hiller*, 16 East, 43. *Claridge v. Dalton*, 4 M. & S. 226.

(*f*) Per Eyre, C. J. 1 B. & P. 655.

(*g*) *Semble, Blackburne v. Doran*, 2 Camp. 503. *Brown v. Maffey*, 15 East, 221. And see *Legge v. Thorpe*, 12 East, 171.

(*h*) *Orr and others v. Maginnis*, 7 East, 359.

(*i*) 3 Camp. 145.

(*k*) 1 Esp. 333. 2 H. B. 607. 11 East, 114. 15 East, 216.

(*l*) 9 & 10 Will. III. c. 17.

(*m*) *Esdaile v. Sowerby*, 11 East, 114. *Bowes v. Howe*, 5 Taunt. 30. 3 Camp. 164. *Thackrah v. Blackett*, Bayl. 137. But see *Brett v. Levett*, 13 East, 213. Note, it was there held that an acknowledgment after his bankruptcy by the drawer, that the bill would be paid, superseded the proof of notice.

(*n*) *Baker v. Birch*, 3 Camp. 107. But such sum may be recovered by the holder, as money had and received by the drawer to his use.

(*o*) *Dennis v. Morrice*, 3 Esp. C. 158. But see Poth. p. 1, c. 5, n. 157. Notice by the drawer to the drawee before the bill becomes due, not to pay it, dispenses with notice of dishonour, but not with the duty of presentment for payment, *Hill v. Heap*, 1 D. & R. 57.

(1) [See ante p. 262, note (1).]

(2) [See *Ralston v. Bullis*, 3 Bibb, 261.]

The necessity of proving due notice is superseded by evidence of part-payment, or other admission on the part of the defendant, (with a knowledge of the facts) of his liability on the bill (*p*).

5thly. In the case of a foreign bill a *protest* is necessary (*q*), for it is part of the custom of merchants (*r*) (1); the * mere proof of noting the bill for non-acceptance, without * 265 a protest, is insufficient to charge the drawer (*s*). Where the drawer resides abroad, the notice of the non-acceptance should be accompanied by a copy, or some other memorial of the protest, for otherwise he cannot know of the protesting (*t*). But if he resides here, although at the time of the dishonour he be abroad, or if he has returned to this country previous to the dishonour of the bill, notice of dishonour is sufficient, for he can make inquiry as to the protest (*u*). Such protest should be made out by a notary public, if there be one in the neighbourhood, if not, by an inhabitant of the place where it is made, in the presence

(*p*) *Vide infra*, 272.

(*q*) *Gale v. Walsh*, 5 T. R. 239. But see *Legge v. Thorpe*, 12 East, 171; and see 7 East, 359, where notice was held to be unnecessary where it appeared that the drawer had no effects in the hands of the drawee at the time, nor any fluctuating balance of assets between them unascertained, which might have afforded probable ground of belief to the drawer that the bill would be honoured.

(*r*) 4 T. R. 174. 5 T. R. 239. B. N. P. 272. 6 Mod. 80. Salk. 131. 12 Mod. 345. Ld. Ray. 993. A bill protested for non-acceptance need not be protested for non-payment (see *Price v. Dardell*, Chitty, 314. *De la Torre v. Barclay*, 1 Starkie's C. 7. But see *Orr v. Maginnis*, 7 East, 359). The noting of a bill is a proceeding unknown to the law as distinguished from the protest (4 T. R. 170.) The protest must be made on the last day of grace. 4 T. R. 174. per Buller, J.

(*s*) 2 T. R. 713. The use of noting is, that it should be done on the day of the refusal, in order that a formal protest may afterwards be drawn. See *Chaters v. Bell*, 4 Esp. 48. Sel. 312.

(*t*) *Goostrey v. Mead*, B. N. P. 271. Bayley on Bills, 118. *Cromwell v. Hynson*, 2 Esp. C. 511. [See *Lenox v. Leverett*, 10 Mass. Rep. 1.]

(*u*) *Cromwell v. Hynson*, 2 Esp. C. 511. *Robins v. Gibson*, 1 M. & S. 288. 3 Camp. 335.

(1) [As to bills drawn in the U. States and payable in a foreign country, the custom of merchants in the United States does not ordinarily require, in order to recover on a protest for non-payment, that a protest for *non-acceptance* should be produced, although the bills were not accepted. In *Supreme Court of U. States, Brown v. Barry*, 3 Dallas, 365. *Clarke v. Russell*, *ibid.* 415.]

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protest.

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of two witnesses (x). The bill should be noted on the day of refusal, but the protest may be drawn up afterwards. (1)

In the case of an inland bill, it is unnecessary to prove a protest, except, perhaps, for the purpose of recovering special damages or costs, occasioned by the non-acceptance or non-payment (y). Such a protest cannot * be made until after the bill has become due (z). The protest is prov-

(x) Bayley, 118. B. N. P. 272. *Chaters v. Bell*, 4 Esp. 48. Sel. 379.

(y) Bayl. 121. *Brough v. Parkins*, Ld. Raym. 992. 6 Mod. 80. Salk. 131. *Harris v. Benson*, Str. 910. Skinn. 272. 4 T. R. 175. 170. Ca. Temp. Hardw. 78; *Lumley v. Palmer*. Interest is recoverable, although there be no protest (2 Starkie's C. 425). [See *Payne v. Winn*, 2 Bay, 374. *Lang v. Brailsford*, 1 Bay, 222. *Murray v. Glayborn*, 2 Bibb, 300.] Qu. whether if in the case of an inland bill, a protest be alleged, it must not be proved. *Boulager v. Talleyrand*, 2 Esp. C. 550.

(z) See 9 & 10 Will. III. c. 17, s. 1, which directs a protest in case of the non-payment of inland bills to the amount of 5*l.* and upwards

(1) [A bill was drawn and dated at New York on persons residing there, who accepted it. The drawers resided in Petersburg in Virginia: The bill being protested for non-payment, two letters were seasonably put into the post office, giving notice to the drawers, one directed to New York and the other to Norfolk, the supposed place of their residence—It was held that the notice was sufficient, as it did not appear that the holders knew where the drawers resided. *Chapman v. Lipscombe*, 1 Johns. 294. See also *Reid v. Payne*, 16 Johns. 218. Where a notary testified that it was his practice, in all cases of protest of bills, where the indorser or drawer lived at a distance, to send written notice by post on the same day, and that he believed he had so done in the case then before the court, it was held to be sufficient, in the first instance, to support an averment of due notice to the indorser, of the dishonour of the bill. *Miller v. Hackley*, 5 Johns. 375.

In an action by an indorsee of a foreign bill of exchange against the drawer or indorser, for non-payment of the bill, the plaintiff is bound to prove a protest for non-acceptance as well as for non-payment, and the protests themselves are the only regular evidence of the fact. *Lenox v. Leverett*, 10 Mass. Rep. 1. And where a bill, noted for non-acceptance, is accepted and paid for the honour of a party, the holder is still bound to the same duties as to protests and notice, as if the bill had not been taken up. *Ibid.*

In South Carolina, a bill, drawn there on a person in New York, is regarded as a foreign bill, and if not protested for non-acceptance, though notice be given of its dishonour, the holder cannot recover against the indorser. *Duncan v. Course*, 1 Rep. Con. Ct. 100. But in New York, a bill drawn in the U. States, on any part of the U. States, is regarded as an inland bill, and no protest is necessary. *Miller v. Hackley*, *ubi sup.*

When a drawer has no effects in the drawee's hands, no protest is necessary, as between them—*Aliter*, if an indorser is to be charged. *Fotheringham v. Price's Executors*, 2 Bay, 291.]

ed by the mere production (a), and will be presumed from a subsequent part-payment of the bill, or promise to pay it, in the case of a foreign bill (b). The presentment of a foreign bill in this country must be proved, as in the case of an inland bill (c). The necessity of proving a protest, is superseded by proof of an admission by the defendant of his liability (d).

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Proof of
protest.

An indorsee in an action against the drawer must prove, 1st. The drawing of the bill: 2dly. Due presentment: 3dly. The drawee's or acceptor's default: 4thly. Notice of the dishonour: 5thly. In the case of a foreign bill, protest: 6thly. Title in himself by indorsement. The proofs, therefore, seem to be similar to those in the preceding class, except as to proving the title by indorsement, the proofs of which have been already partially considered (e); but some additional * observations as to proof of notice, which are applicable to this case, will be subsequently made in considering the evidence in an action by an indorsee against an indorser.

Indorsee v.
Drawer.

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Proof of in-
dorsement.

Where the indorsement is by an agent, proof of the agent's authority must be given (f); and if the principal expressly enjoin the agent not to indorse a bill, which he delivers to him in order to procure it to be discounted, he will not be bound by an indorsement by the agent (g); but in the absence of any direction as to indorsing the bill, if the agent in fact indorse it, and the principal afterwards promise to pay the bill, it is strong evidence of authority to the agent (h).

By agent.

upwards for value received, payable at a certain number of days, weeks and months from the date, and accepted by the underwriters of the acceptor, to be made after the expiration of three days after the bill shall become due. The stat. 3 & 4 Ann. c. 9, s. 4, extends these provisions to cases where the drawee refuses to accept. By 3 & 4 Ann. c. 9, s. 6, no such protest is necessary either in the case of non-acceptance or non-payment, unless the bill be expressed to be for value received, and be drawn for the payment of 20l. sterling or more. The first of these statutes does not apply to bills payable after sight.

(a) 12 Mod. 345. Per Holt, C. J. Bayley, 226.

(b) Bayley, 221. *Gibbon v. Coggon*, 2 Camp. 188. *Taylor v. Jones*, 2 Camp, 105.

(c) *Chesmer v. Noyes*, 4 Camp. 129.

(d) *Vide infra*.

(e) In the case of an indorsee against the acceptor.

(f) See tit. *Agent*.

(g) *Fenn v. Harrison*, 3 T. R. 757. And a promise to pay the bill would be a mere *nudum pactum*, *ibid*.

(h) *Fenn v. Harrison*, 4 T. R. 177.

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IV.Proof of in-
dorsement.
Indorsee v.
Indorser.Proof of in-
dorsement.

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Presentment.
Refusal.
Notice.

Every indorser of a bill of exchange is to be regarded as a new drawer. Hence, the same proofs are for the most part applicable, as in the last class of cases (*h*). The plaintiff must prove, 1st. The indorsement by the defendant, which amounts to an admission of the drawing, and of the previous indorsements. 2dly. Due presentment. 3dly. The refusal to accept or pay. 4thly. Due notice to the defendant, or of facts in excuse. 5thly. Title in himself by indorsement; and, 6thly. In the case of a foreign bill, a protest.

1st. Proof of the defendant's indorsement is conclusive evidence of the hand-writing of the drawer, and that of all the prior indorsees (*i*), although the bill be forged. The subsequent indorsements must be proved as alleged in the declaration. An admission by the * defendant of his liability, through the medium of a subsequent indorsement, will be evidence to prove it (*k*). If the bill be payable to *A.* or bearer, and *A.* deliver it for money without indorsing it, it is a sale by *A.*, and he is not liable on the bill (*l*). An indorsee cannot recover against an indorser, on proof that he took the bill when due to the acceptor, who had absconded with it (*m*), although the defendant had promised to pay the bill if produced (*n*).

2dly. The presentment, and 3dly. The refusal, must be proved as in an action against the drawer (*o*); and 4thly. The proofs of due notice of the dishonour to the drawer of a bill, apply for the most part to the proofs of notice to an indorser (*p*). It is not necessary to prove any demand on the drawer or prior indorsers, or to give any notice to them, since the undertaking is to pay on the default of the acceptor; and the very existence of the drawer or prior indorsers is immaterial (*q*). The rule as to notice,

(*h*) 2 Show. 495. 1 Str. 479. 2 Burr. 674. 3 East, 482.

(*i*) Salk. 127. *Lambert v. Oakes*, Ld. Raym. 443. *Peake's L. E.* 221. Although stated without necessity. *Ibid.* and *Critchlow v. Parry*, 2 Camp. 282. *Chaters v. Bell*, 4 Esp. C. 210.

(*k*) *Sidford v. Chambers*, 1 Starkie's C. 320.

(*l*) Per Holt, C. J. *Gov. & Co. of the Bank of England v. Newnan*, Ld. Raym. 442.

(*m*) *Powell v. Roach*, 6 Esp. 76. 12 Mod. 310. 1 Show. 164. Holt, 118.

(*n*) *Ibid.* And see 1 Taunt. 420.

(*o*) *Supra*, 256. An action lies by the indorsee against the indorser immediately upon non-acceptance. *Ballingalls v. Gloster*, 3 East, 481. [See Ante p. 257, note (1).]

(*p*) *Supra*, 257. 259.

(*q*) See Ld. Mansfield's observations, 2 Burr. 675. So in the case of a cheque, 2 Camp, 537.

by an indorsee to an indorser or drawer, is, that reasonable notice shall be given, and what is reasonable notice seems to be a question of law, the rule in regard to which has already been stated (*r*). What has been said as to the *notice from the payee to the drawer, applies for the most part to notice by an indorsee to an indorser (*s*) (1). There are, however, some considerations which are peculiar to the present case, for where there are several previous indorsers, the indorsee may, by giving notice, proceed against any or all of them, as well as against the drawer.

Where a bill passed through the hands of five persons, *A. B. C. D. and E.*, all of whom lived in or near London, and the bill being dishonoured, the holder on the same day gave notice to *E.*, who on the next day gave notice to *D.*, and he on the same day to *A.*, the Court were of opinion that due diligence had been used (*t*).

Where the holder had deposited a bill indorsed in blank with his bankers in London, which was presented

(*r*) *Supra*, 258. *Darbishire v. Parker*, 6 East, 10, 11, 12. But see *Hilton v. Shepherd*, 6 East, 14, *n*.

(*s*) *Vide supra*, 257. Notice to the indorser of a bill of the dishonour of the bill drawn by him is insufficient, *Beauchamp v. Cash*, 1 D. & R. 3.

(*t*) *Hilton v. Shepherd*, 6 East, 14, *n*.

(1) [When the indorser lives in another town, notice to him is seasonable, if put into the post office at any time during the day succeeding that on which the note becomes due. *Whitwell & al. v. Johnson*, 17 Mass. Rep. 453. *Shed v. Brett*, 1 Pick. 401. But notice may be given on the day the note becomes due, after refusal by the maker to pay on demand made on that day. 1 Pick. *ubi sup.* *Corp v. M'Comb*, 1 Johns. Cas. 328. *Lindenberger & al. v. Beall*, 6 Wheat. 104. And notice by mail is sufficient, though it is never received by the indorser: Putting a letter into the post office is notice *per se*. 1 Pick. *ubi sup.* *Smith v. Bank of Washington*, 5 Serg. & R. 322. When the indorser resides in a post town different from that in which the note is dishonoured, it is proper to send him notice by the mail; and *perhaps*, where he does not, sending it to the nearest post town is sufficient. Per Parker, C. J. 1 Pick. *ubi sup.* A notice to an indorser is sufficient, though it does not state at whose request it is given, nor who is the owner of the note. *Ibid.* *Skrieve v. Duckham*, 1 Littell's Rep. 194. An action may be commenced against the indorser of a note or the drawer of a bill, on the day the note becomes due, or the bill is presented, after refusal by the maker to pay, or by the drawee to accept, and after notice to the indorser or drawer is put into the post office (if they live in another town) and the writ may be served before the notice can be received by course of mail. 1 Pick. *ubi sup.* *Stanton & al. v. Blossom & al.* 14 Mass. Rep. 116.]

PART by them at two o'clock on the afternoon of Saturday
IV. (when due), and being dishonoured, was noted, and pre-
 ——— sented again between nine and ten in the evening by a
Proof of notice. notary, and on the Monday the bankers informed the holder at Knightsbridge of the dishonour, and he the same day gave notice to the indorser in Tottenham-court-road, the notice was held to be sufficient (*u*).

Where a bill due on the 25th, was presented on that day by the banker of the holder, at another banking-house in London, and dishonoured, but a doubt being entertained, whether it had not been presented too early on that day, it was presented again on the 26th, and again dishonoured, and was returned to the holder on the same day, who sent notice of the dishonour to the indorser in the country on the 27th, it was held to be sufficient (*x*).

* 270 * Each indorsee is bound to give notice within a day after he has received notice (*y*).

Notice.
Excuse for
want of.

The plaintiff may prove in excuse for not giving notice, that the indorser gave no consideration for the note, and knew the maker to be insolvent (*z*): That the defendant, the payee of the note, had no effects in the hands of the maker (*a*): That the indorsee was ignorant of the indorser's place of abode (*b*); and then it is a question of fact, whether he used due diligence to discover it (*c*). He ought to show that he has made diligent but ineffectual inquiry in places where the indorser was likely to be

(*u*) *Haynes v. Birkes*, 3 B. & P. 599.

(*x*) *Langdale v. Trimmer*, 15 East, 291.

(*y*) *Turner v. Leach*, 4 B. & A. 451. An indorser who pays the bill after laches by a subsequent indorsee cannot recover against a former indorser, although had successive notices been given the defendant would not have received earlier notice. *Ibid.* and per Lord Ellenborough, in *Marsh v. Maxwell*, 2 Camp. 210, *n*.

(*z*) *De Berdt v. Atkinson*, 2 H. B. 376; and see *Sisson v. Thomson*, Sel. N. P. 291. But a mere accommodation indorsee is entitled to notice (*Smith v. Becket*, 13 East, 187). *Secus*, in an action against the drawer of a bill accepted for his accommodation, for the drawer is the real debtor, and cannot be hurt by want of notice.

(*a*) 1 Esp. C. 302. See 13 East, 187; Bayl. 136.

(*b*) 12 East, 433; 3 Esp. C. 240.

(*c*) *Bateman v. Joseph*, 12 East, 433. And see *Goodall v. Dolley*, 1 T. R. 712.

found (*d*) (1). That the defendant afterwards promised to pay the bill (*e*); and a promise made to a subsequent indorsee is evidence for this purpose (*f*).

It is no defence to an action by a *bona fide* indorsee without knowledge that the bill had already been dishonoured, and no notice given (*g*). Notice.
Excuse for
want of.

One who indorses a bill without consideration, but *without fraud, is entitled to notice, although the acceptor is a fictitious person (*i*). * 271

It is no excuse to show that the drawee has no effects of the drawer in his hands (*k*), or that the payee (the indorser) gave no consideration to the maker of a note (*l*); or that there was an understanding that the note was not to be put in suit; or that the payee and indorser of a promissory note knew that *D.*, at whose house the note was made payable, had no effects of the maker in his hands, and requested it to be sent to him that he might pay it (*m*); that the payee and indorser of the bill had received notice from the drawer that he would not pay the bill (*n*); that the indorsee being ignorant of the laches in the holder, paid the bill (*o*); that the indorsers had full knowledge of the bankruptcy of the drawer and of the acceptor, before, and at the time when the bill became

(*d*) *Vide supra*, Vol. I. p. 338. Inquiry at the place where the bill was payable for the residence of the indorser, was held to be insufficient. *Beveridge v. Burgis*, 3 Camp. 262, [and cases cited by Mr. Howe, in his note to that case.]

(*e*) *Vide infra*, 272.

(*f*) *Potter v. Rayworth*, 13 East, 417.

(*g*) *Dunn v. O'Keefe*, 5 M. & S. 282. [6 Taunt. 305. S. C.]

(*i*) *Leach v. Hewit*, 4 Taunt. 731.

(*k*) *Goodall v. Dolley*, 1 T. R. 712. *Peake's C.* 202. *Brown v. Massey*, 15 East, 216; where the defendant had indorsed for the accommodation of a subsequent indorser, but did not know that the acceptor had no effects of the drawer in his hands.

(*l*) *Free v. Hawkins*, 1 Holt's C. 550, by Gibbs, C. J.

(*m*) *Nicholson v. Gouthit*, 2 H. B. 609. *A.* being insolvent, *B.* as a security, indorsed a note made by *A.* payable to *B.* at the house of *D.* for a debt due from *A.* to *C.* *B.* being informed that *D.* had no effects of *A.*'s in his hands, desires *D.* to send the note to him, and says he will pay it, having then a fund in his hands for that purpose; the note was not presented at *D.*'s house till three days after it was due; and it was held that it was discharged.

(*n*) 1 T. R. 171.

(*o*) *Roscow v. Hardy*, 12 East, 434.

(1) [See *Sturges & al. v. Derrick*, Wightwick, 76.]

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due (*p*); that the indorsement was lent to the maker of a note, to enable the maker to raise money from the plaintiffs, who were bankers, and agreed to advance the money thereon for six months, and had renewed their advances at the end of six months, without the knowledge * of the indorser (*q*). So, where a bill was drawn and indorsed by several indorsers for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, a prior indorser, it was held that he was entitled to notice of the dishonour, in order to enable him, (if he had no remedy on the bill) to call immediately upon the last indorser, to whom he had lent his indorsement, and, who had received the amount of the bill (*r*) (1).

(*p*) *Esdaile v. Sowerby*, 11 East, 114.

(*q*) *Smith v. Beckett*, 13 East, 187.

(*r*) *Brown and others v. Maffey*, 15 East, 216. Bayley, 137. Peake's C. 202.

(1) [In *Cory & al. v. Scott*, 3 B. & A. 619, where a bill was drawn for the accommodation of an indorsee, and neither he nor the drawer had any effects in the hands of the acceptor; it was held that a subsequent indorsee, in order to entitle himself to recover against the drawer, was bound to give notice of non-payment.

This case has greatly shaken, if not overturned, that of *Walwyn v. St. Quintin*, 1 B. & P. 652—but most of the American cases agree with it. See *Scarborough v. Harris*, 1 Bay, 175. *French's Executor v. Bank of Columbia*, 4 Cranch, 141. *Pons's Executors v. Kelly*, 2 Hayw. 45. *Smith v. M'Lean*, 2 Taylor, 72. *Buck v. Cotton*, 2 Conn. Rep. 126. *Crossen v. Hutchinson*, 9 Mass. Rep. 205. *Bond & al. v. Farnham*, 5 Mass. Rep. 170. *Sandford v. Dillaway*, 10 Mass. Rep. 52. *Farnum v. Fowle*, 12 Mass. Rep. 89. *Barton v. Baker*, 1 Serg. & Rawle, 334. In this last case, however, it was held that an acceptance by the indorser of an assignment of the drawer's estate, for the purpose of indemnifying him against his indorsement, rendered notice unnecessary. See Post, 274, note (1).

Evidence of an agreement between the indorser and indorsee of a note taken after due, that the latter shall look to the drawer and not to the indorser, was admitted in South Carolina. *Rugely v. Davidson*, 2 Rep. Con. Ct. 33.

In Tennessee, it has been decided that notice is not necessary where the indorser and indorsee knew of the insolvency of the maker at the time of the indorsement. *Stothart v. Parker*, 1 Overton's Rep. 260. See also *Crossen v. Hutchinson*, ubi sup. *Agan v. M'Manus*, 11 Johns. 180.

If a note be void in its creation, and known to the indorser to be so, demand and notice are not necessary to charge him. *Copp v. M'Dugall*, 9 Mass. Rep. 1. A waiver, by an indorser, of a right to notice of non-payment by the maker, does not dispense with the necessity of a demand upon him. *Berkshire Bank v. Jones*, 6 Mass. Rep. 524. See *Hill v. Heap*, Ante, p. 269, note, (o). But when the maker has absconded before the note falls due, a demand is not

6thly. The proof of a protest has already been considered (t).

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If an acceptance of the bill be stated, although unnecessarily, it must be proved (u).—Such are the detailed proofs in these cases.

Variance.

It is a general rule, that an admission of the party's liability on the bill, made with a knowledge of the facts, will supersede the necessity of the usual regular proof in detail. Such an admission operates as *presumptive* evidence that all things have been *rite acta*, or perhaps, in some cases, even still more strongly as a *waver* by the party of an irregularity as to presentment, notice, or protest (x), of which he actually was, or may be presumed to have been cognisant. These admissions consist either in part-payment, which is the strongest of all, or in asking for time, or in an express promise to pay the bill, or in other declarations, or conduct by which the party plainly acknowledges his liability.

Presumptive
evidence.

* Part-payment of the amount of the bill by the drawer * 273 raises a presumption that he has received due notice of the acceptor's default (y).

Where the declaration alleged a due presentment of the bill for payment, which had been drawn and accepted for the accommodation of the indorser, and the bill was not presented till after banking hours, when the answer was given "no effects," an application by the indorser, after declaration filed, for further time, was held to be evidence

Presumptive
proofs.

(t) *Supra*, 264.

(u) Per *Ld. Ellenborough*, *Jones v. Morgan*, 2 Camp. 474.

(x) *Gibbon v. Coggon*, 2 Camp. 188. 2 T. R. 713. 6 East, 16. 7 East, 231. 13 East, 417. *Wood v. Brown*, 1 Starkie's C. 207. Peake's C. 202.

(y) An offer to give another bill supersedes the proof of indorsement. *Bosanquet v. Anderson*, 6 Esp. 43. An agreement between the drawer and first indorser, stating the bill to be then over-due, and dishonoured, and stipulating for payment by weekly instalments, admits notice of the dishonour, *Gunson v. Mett*, 1 B. & C. 193; 2 D. & R. 334.

necessary to charge the indorser. *Putnam & al. v. Sullivan & al.* 4 Mass. Rep. 45. *Widgery v. Monree & al.* 6 Mass. Rep. 449.

In Virginia, the indorser of a note is not liable on non-payment by the maker, unless the maker is shown to be insolvent, or a suit has been brought against him and proved fruitless; although such indorser has been counter-secured by the maker for such indorsement. *Dulany v. Hodgkin*, 5 Cranch, 333.

See Mr. Day's notes to *Wilkes & al. v. Jacks*, Peake's C. 203, and *Smith & al. v. Becket*, 13 East, 189. Swift on Ev. and Bills, 287—290.]

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IV.Presumptive
evidence. .
* 274

of the waiver of the objection, with notice of the fact of which he had the means of informing himself (z). So where the drawer, knowing that time had been given by the holder to the acceptor, but supposing that he was still liable on the * bill, in default of the acceptor, said, three months after the bill was due, that he was liable, and if the acceptor did not pay it, he would, it was held that he was bound by the promise (a). Where, however, a promise to pay has been made in ignorance of material facts, such as the holder's laches, it will not supersede the necessity of the usual proof of notice (b).

Where the indorsee of an inland bill presented it before it was due, for acceptance, and it was refused on the 4th of November, and the indorsee on the 6th of January following, (the bill expiring on the 11th of January,) gave notice generally of the dishonour of the bill, but without specifying the time or circumstances of the presentment, whereupon the defendants, the drawers, being ignorant of the circumstances, made a proposal the next day to pay the bill by instalments, it was held that they had not waved the notice (c). So a promise made by the defendant when

(z) *Greenway v. Hindley*, 4 Camp. 52. It operates as a *waver* of the want of notice (*Rogers v. Stephens*, 2 T. R. 713. Peake's C. 202. 7 East, 231. 13 East, 417); and where, on demand made, the drawer answered that the bill must be paid, it was held to be equivalent to a promise to pay (*ibid.*; and see *Lundie v. Robertson*, 7 East, 231). The drawer on the first application promised the plaintiff that he would pay the bill if he would call again; upon a second application, he said that he had not had regular notice, but that as the debt was justly due he would pay the bill (and see *Haddock v. Bury*, 7 East, 236, n. *Gibbons v. Coggon*, 2 Camp. 188. *Taylor v. Jones*, 2 Camp. 105. A waver by a drawer may be implied, but *qu.* whether a waver by an indorsee must not be express, 4 Taunt. 93. A letter written by the drawer, stating that the bill had been accepted for his accommodation, and would be paid, dispenses with notice (*Wood v. Brown*, 1 Starkie's C. 207.) But a letter written by an indorser who had been applied to for payment after several days laches, informing the plaintiff that he would not remit till he received the bill, and desiring the plaintiff, if he considered him (the defendant) to be unsafe, to return the bill to a prior indorser, was held to be no such waver of the laches, and promise to pay, as would entitle the plaintiff to recover (*Borrodaile v. Lowe*, 4 Taunt. 93). So where the drawer said, "If I am bound to pay it, I will," *Dennis v. Morrice*, 3 Esp. C. 158). So where he merely offered to compromise. *Cuming v. French*, 2 Camp. 106. n.

(a) *Stevens v. Lynch*, 12 East, 38.

(b) *Goodall v. Dolly*, 1 T. R. 712. *Blisard v. Herit*, 5 Burr. 2670. 4 Taunt. 93.

(c) 1 T. R. 712.

arrested, and when he is ignorant of the facts, will not be a waiver (*d*).

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IV.

Where the defendant, being a foreigner, on being applied to to take up the bill, said, "I am not acquainted with your laws; if I am bound to pay it, I will," it was held that the declaration did not supersede the necessity of proving notice (*e*). So a subsequent promise to pay the amount by instalments, by one who is ignorant of the circumstances attending the dishonour of the bill, is no waiver of the want of presentment (*g*). (1)

Presumptive
evidence.

* A promise by one of several indorsers who are not partners is not evidence against the other indorsers (*h*). It has been said, that where an indorser has promised to pay the bill, payment must still be demanded before the

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(*d*) *Rouse v. Redwood*, 1 Esp. C. 155. 4 Taunt. 93.

(*e*) *Dennis v. Morrice*, 3 Esp. C. 158.

(*g*) 2 H. B. 336. 1 T. R. 712.

(*h*) 1 Barnes, 317. 1 Esp. C. 135.

(1) [A promise by an indorser to pay a note, after being discharged in law by neglect of due notice, is not binding, unless made with a knowledge of all the material facts. *Martin v. Winslow*, 2 Mason's Rep. 241. *Duryee v. Dennison*, 5 Johns. 248. *Fotheringham v. Price's Exor.* 1 Bay, 291. *Donaldson v. Means*, 4 Dallas, 109. *Tower v. Durrell*, 9 Mass. Rep. 332. And the promise must be explicit, and made out by clear and unequivocal evidence. *Miller v. Hackley*, 5 Johns. 375.

Where the indorser, knowing that a demand has not been made on the maker, promises to pay the note, it is a waiver of the necessity of proving demand and notice. *Hall v. Freeman*, 2 Nott & McCord, 479. *Hopkins v. Liswell*, 12 Mass. Rep. 52. *Pierson v. Hooker*, 3 Johns. 68. Such promise is an implied admission that the indorser has received notice—but where it is evident that such notice was not given, a promise by the indorser to pay, after he is legally discharged, and without any consideration, will not maintain an action. *Lawrence v. Ralston*, 3 Bibb, 102. *Philips v. M'Curdy*, 1 Har. & J. 187. *Walker v. Laverty*, 6 Munf. 487.

Where a party relies on a waiver of demand and notice, he must allege the demand and notice in his declaration, in the same manner as if actually given, and proof of the waiver is equivalent to proof of demand and notice. *Norton v. Lewis*, 2 Conn. Rep. 478. *S. P. Williams v. Matthews*, 3 Cowen, 252. And an agreement by an indorser, after the note was due, but before the days of grace had expired, to pay the amount, in consideration of time being given, was held to be a waiver of demand and notice. *Norton v. Lewis*, ubi sup. So if the indorser receive security of the maker to meet the indorsement. *Bond & al. v. Farnham*, 5 Mass. Rep. 170. *Tower v. Durrell*, ubi sup. *Mead v. Small*, 2 Greenleaf, 207. See *Agan v. McManus*, 11 Johns. 180, where it is said the doctrine as to waiver of notice does not apply to promissory notes.]

PART
IV.

action is brought (i); this, however, appears to be unnecessary.

A promise is binding although made under ignorance of the law (k).

An offer to pay part by way of compromise, and made for the purpose of buying peace, is not admissible in evidence (l); and a mere offer to compromise is no waiver of the want of notice (m).

Collateral
liability,Drawer
v.
Acceptor.

III. Where the liability is consequent on the defendant's own default, as where, 1st, the drawer brings an action against the acceptor, or 2ndly, the acceptor against the drawer. 1st. By the drawer against the acceptor (n); the plaintiff must prove,

1st. The acceptance of the bill by the defendant, which is *prima facie* evidence that he has effects of the drawer in his hands (o).

2ndly. Presentment to the acceptor, and the refusal by him to pay the bill.

Payment,

3rdly. The payment of the bill by the plaintiff, the drawer.

The indorsement of a general receipt on the bill *prima facie* imports payment by the acceptor, although the bill be produced by the drawer, for it is rather to *be presumed, that the bill was delivered to him by the acceptor, on a settlement of accounts (p); and therefore the plaintiff should prove a payment to the holder by himself (q).

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4thly. That the acceptor has effects of the drawer in his hands; of this fact the acceptance is *prima facie* evidence (r). The bankruptcy of the acceptor is no defence against the drawer who has paid the bill since the bankruptcy (s).

(i) *Brown v. Macdermot*, 5 Esp. C. 265. *tamen qu*,

(k) 12 East, 38; and see tit. *Admissions*.

(l) B. N. P. 236. *Gunn v. Gullock*, Chitty, 288.

(m) *Cuming v. French*, 2 Camp. 106. n.

(n) The drawer may recover against the acceptor, having effects of the drawer in his hands, in his own name, without assignment from the payee.

(o) 3 T. R. 183, *Vere v. Lewis*.

(p) *Scholey v. Walsby*, Peake's C. 24. So where an indorsee having been obliged to take up the bill, declares specially against the acceptor. *Mendez v. Carreroon*; 1 Ld. Raym. 742.

(q) Peake's C. 24. Peake's L. E. 221.

(r) 10 Mod. 36, 37. *Parminster v. Simmons*, 1 Wils. 185. 3 T. R. 183. 3 East, 169.

(s) *Mead v. Braham*, 3 M. & S. 91.

The acceptor of an accommodation bill, in an action against the drawer, must prove, 1st. The drawing of the bill by the defendant (*t*), by proof of his hand-writing. 2dly. He must rebut the usual presumption of consideration, by evidence showing the absence of it. 3dly. Payment of the bill by himself (*u*), or execution against his person (*x*). The mere production of the bill will not afford even *prima facie* evidence of payment without showing that the bill has been in circulation since the acceptance; and payment is not to be presumed from a receipt indorsed on the bill, except it be in the hand-writing of some person entitled to demand payment (*y*).

PART
IV.Acceptor
v.
Drawer.

In order to prove the particular amount of damage which the plaintiff has sustained, the course of exchange, and the liability of the defendant to pay * re-exchange, are questions for the jury (*z*). Interest is recoverable from the day when the bill became due to the day of signing judgment (*a*).

Damages.

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Where a sum is payable on a promissory note by instalments, and the whole is to become due on the first default, interest becomes due on the first default (*b*); and it is recoverable, although not stated in the particulars (*c*). Interest may be recovered against the drawer of an inland bill, without proof of a protest (*d*).

Interest.

An indorsee having received part of the contents from the drawer, cannot recover more than the residue from the acceptor (*e*).

The acceptor of a bill payable in England is liable only to the sum payable, and 5-per cent. interest (*f*).

In an action on a foreign note payable in the currency of this country, interest is to be calculated according to the state of exchange at the time of the demand of payment (*g*).

(*t*) *Vide supra*, 220, 254.

(*u*) *Taylor v. Higgins*, 3 East, 169. In the latter case the count must be special.

(*x*) *Ibid*.

(*y*) *Pfel v. Vanbatenberg*, 2 Camp. 439.

(*z*) *De Tastet & others v. Baring & others*, 2 Camp. 65. 11 East, 265. 2 H. B. 378. 3 B. & P. 335.

(*a*) *Robinson v. Bland*, 2 Burr. 1085. 2 T. R. 58.

(*b*) 4 Esp. C. 147.

(*c*) *Ibid*.

(*d*) *Windle v. Andrews*, 2 Starkie's C. 425. [3 C. 2 B. & A. 696.]

(*e*) *Bacon v. Searles*, 1 H. B. 88.

(*f*) *Woolseley v. Crawford*, 2 Camp. 445.

(*g*) *Pollard v. Herries*, 3 B. & P. 335. *Mellish v. Simeon*, 2 H. B. 378. But see *Houriet v. Morris*, 3 Camp. 303.

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IV.

Want of consideration.

fide indorsee for value (z) (1). As between the original parties to the bill, the *total failure* of consideration may be set up as a defence (a) (2). It may be shown, that the

(z) 2 T. R. 71. Com. Rep. 43. *Snelling v. Briggs*, B. N. P. 274. *Puget de Bras v. Forbes*, 1 Esp. 117, where, by the course of trade, a bill was to be given by the drawer before the consideration was paid, and before payment the payee's agent became bankrupt, it was held that the payee could not recover against the drawer. *Ibid.* and see 1 Str. 674.

(a) 7 T. R. 121. Even although the defendant has promised to pay the bill, if no proof of payment be given within a specific time which is elapsed. *Elmes v. Wills*, 1 H. B. 64.

(1) [The consideration of a promissory note may be inquired into as between the original parties, and if there is no consideration for the promise, it is *nudum pactum*, and cannot be enforced by action. *Schoonmaker v. Roosa & al.* 17 Johns. 301. *Pearson v. Pearson*, 7 Johns. 26. *Ten Eyck v. Vanderpool*, 8 Johns. 120. *The People v. Howell*, 4 Johns. 296. *Fiak v. Cox*, 18 Johns. 145. *Yelv. 4. b. note.*

In Massachusetts, it is held, that a note given without consideration cannot for that reason be avoided, if no fraud or imposition has been practised. *Bowers v. Hurd*, 10 Mass. Rep. 427. And see Swift on Bills, 265.]

(2) [Where a promissory note is given for the purchase of real property, and the title to the property fails, it is not a good defence against the note, unless the failure be total. *Greenleaf v. Cook*, 2 Wheat. 13. See *Smith v. Sinclair*, 15 Mass. Rep. 171. *Lloyd v. Jewell & al.* 1 Greenleaf, 352. *Frisbie v. Hoffnagle*, 11 Johns. 50. Although the consideration of a note fail by reason of the failure of the payee to perform an agreement, yet if a new agreement be made by the parties, as a substitute for the old, this failure of consideration creates no equity in favour of the maker against the indorsee, even in Virginia. *Young v. Grundy*, 7 Cranch, 548.

A note given in consideration of the assignment of a patent right, which had been fraudulently obtained, was held to be void, although certain materials had been furnished, and certain instructions given by the payee to the maker. *Bliss v. Negus*, 8 Mass. Rep. 46. A note given on the sale of a chattel, fraudulently represented by the vendor to be of great value, when it was of *no value*, is without consideration and void—and evidence of these facts is admissible under the general issue, in an action on the note. *Sill v. Rood*, 15 Johns. 230. So in an action on a note, the maker may show that the consideration was a quitclaim deed, executed by the plaintiff to him, of lands which the plaintiff induced him to purchase by fraudulently pretending to a title to them. *Hawley v. Beeman*, 2 Tyler, 238.

Where the owner of a slave told him if he would procure good notes for \$200, he should be immediately manumitted, and the slave procured the notes and delivered them to his master, who made out a deed of manumission, but refused to deliver the deed, and kept it and the notes for more than two years, during which time he held the slave, as a slave; it was held, in an action on one of the notes against the maker, that the consideration had wholly failed, and that the plaintiff could not recover. *Petry v. Christy*, 19 Johns. 53.]

contract on which the bill was given is *wholly* rescinded, where it is entire; or, that it has been *partially* rescinded, where it consists of divisible parts (*b*).

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IV.

Where a note was given by the defendant as an apprentice fee with his son, and the indentures were void for want of a stamp under the statute 8 Anne, it was held that the plaintiff could not recover, although he had maintained the defendant's son for a time (*c*); and in some cases, as between the original parties, the defendant may show what consideration was really given for the bill, and the plaintiff cannot recover more (*e*).

Want of consideration.

Where the defendant accepted the bill in consideration of partnership, and broke off the treaty, it was *held that * 281 the plaintiff could recover no more than compensated the injury actually sustained (*f*). In order, however, to reduce the demand, the acceptor must prove a failure to a certain liquidated amount. It is now completely settled, that a partial failure which may be the subject of an action for unliquidated damages, and which leaves the whole of the contract still open and unrescinded, cannot be inquired into in an action on the bill or note (*g*), as, that the goods delivered are of bad quality (*h*); and, in general, a party who has given a bill of exchange for the amount of a tradesman's bill, is precluded from disputing the reasonableness of the charges (*i*).

Where the defendant having possession of the premises, gave a bill as a consideration for a lease, which the plaintiff refused to execute, it was held that the refusal constituted no defence to the action (*k*); but where a *partial*

(*b*) Bayley, 236. *Barber v. Backhouse*, Peake's C. 61; where, in an action by the payee against the acceptor of a bill, the defendant paid part of the money into court, and proved that there was no consideration for the residue, the jury, under the direction of Lord Kenyon, found for the defendant.

(*c*) 7 T. R. 121.

(*e*) *Darnell v. Williams*, 2 Starkie's C. 166. And see *Wiffen v. Roberts*, 1 Esp. C. 261. He may show that it was accepted for value as to part, and as an accommodation bill as to the residue. 2 Starkie's C. 166.

(*f*) Peake's C. 216.

(*g*) *Morgan v. Richardson*, 1 Camp. 40, n. 2 Camp. 346. *Fleming v. Simpson*, 1 Camp. 40, n. *Moggridge v. Jones*, 14 East, 486. 3 Camp. R. 38. Bayley, 235.

(*h*) *Morgan v. Richardson*, 7 East, 483. 3 Smith, 487. 1 Camp. 40. 1 Esp. 159. *Moggridge v. Jones*, 3 Camp. 38. 14 East, 486. *Tye v. Gwynne*, 2 Camp. 346.

(*i*) 1 Esp. 159. 261. *Solomon v. Turner*, 1 Starkie's C. 51.

(*k*) 3 Camp. 38. 14 East, 484, *Moggridge v. Jones*.

PART
IV.Defence.—
Want of con-
sideration.

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failure arises from fraud it is a defence to the action (l). Thus, where the bill is given for the price of goods fraudulently sold under a warranty, the breach of warranty is a bar to an action on the bill, if the defendant has tendered back the goods (m) (1).

* The failure of consideration is no defence against an indorsee for value (n); neither is it any defence against a *bona fide* indorsee for value, that the bill was an accommodation bill, and that he knew it to be such (o).

It is no defence to an action by the indorsee against the acceptor, that the drawer of a bill payable to his own order had committed a secret act of bankruptcy, and that the assignees under the commission had withdrawn from the defendant a lease, pledged by the drawer to him as a security against his acceptance (p). If the indorsee knew that the bill was an accommodation bill, he can recover no more than the value he has paid; but if the bill was made upon a good consideration he may recover the whole; and if he has not paid full value for it, he is a trustee for the indorser in respect of the surplus (q).

Illegality.

As against an original party to the bill or note, the defendant may give the *illegality* of the consideration in evidence in bar of the action (s). And so he may as against an indorsee who was privy to the illegal transaction (t). But no illegality between the original parties will affect an indorsee,

(l) 2 Taunt. 2. *Ledger v. Ewer*, Peake's C. 216. *Fleming v. Simpson*, 1 Camp. 40, n. *Secus*, where a purchaser who has given the bill in payment does not repudiate the contract, *Archer v. Bamford*, 3 Starkie's C. 175.

(m) *Lewis v. Cosgrave*, 2 Taunt. 2. The jury found for the plaintiff; but the court granted a new trial, on the ground of fraud. And see *Solomon v. Turner*, 1 Starkie's C. 51.

(n) *Boehm v. Sterling*, 7 T. R. 423. Even although it was indorsed over after it was due, the drawers (the defendants) having issued it nine months after the date.

(o) *Smith v. Knox*, 3 Esp. C. 46. But it would be otherwise if he knew that the bill was drawn for a particular purpose, 3 Esp. 46. And see *Charles v. Marsden*, 1 Taunt. 224; *Fentum v. Pocock*, 5 Taunt. 193; and per Eldon, C. *Bank of Ireland v. Beresford*, 6 Dow, 237.

(p) *Arden v. Watkins*, 3 East, 317.

(q) *Wiffen v. Roberts*, 1 Esp. C. 261.

(s) As where the bill had been accepted in a smuggling transaction. 1 Camp. 383.

(t) 1 Esp. C. 389. 2 Esp. C. 539. [*Brisbane v. Lestajette*, 1 Bay, 113. *Wiggin & al. v. Bush*, 12 Johns. 306.]

(1) [See ante, p. 280, note (2).]

(except under *the statutes against gaming and usury) unless he had notice (x) of the illegality, or took the bill after it become due, from one who had notice(y). The question of *mala fides* in such cases is a question of fact for the consideration of the Jury (z). Illegality.

Where a bill is given for the differences in a stock-jobbing transaction, an indorsee who is *privy* to the transaction cannot recover (a). Where the payee of such a bill indorsed it after it was due, it was held that the indorsee could not recover (b). Where part of the consideration is illegal the bill is void for the whole (c).

In an action by an indorsee against the maker of a note, letters from the payee to the maker, proved to be contemporaneous with the making of the note, have been held to be evidence (d) to prove that it was illegal in its creation.

By the provisions of the stat. 9 Ann. c. 14. s. 1, securities for money or valuables won by gaming, &c. or for repaying money knowingly lent for gaming, are void; and by the stat. 12 Ann. stat. 2, c. 16, s. 1, so are contracts for the payment of money lent on usury (e). And a *bona fide* holder could not recover * on a bill usurious in its origin (s), or on a bill legal in its inception, but indorsed by the payee upon the usurious contract (f). * 284

By the stat. 58 Geo. 3, c. 93, no bill or note, although it may have been given for an usurious consideration, shall be void in the hands of a *bona fide* indorsee, without notice of the usury. And an innocent holder of a bill accepted to secure a gaming debt may recover against

(x) Doug. 632. *Wyatt v. Bulmer*, 1 Esp. C. 389; 2 Esp. C. 538. *Dagnall v. Wigley*, 11 East, 43, where a broker got the bill discounted for illegal brokerage.

(y) Doug. 632. [*Perkins v. Challis*, 1 N. Hamp. Rep. 254.]

(z) Per Ld. Mansfield, Doug. 632.

(a) *Steers v. Lashley*, 6 T. R. 61; 7 T. R. 630.

(b) 7 T. R. 630; *Brown v. Turner*.

(c) *Scott v. Gilmore*, 3 Taunt. 226.

(d) *Kent v. Lowen*, 1 Camp. 177. *Walsh v. Stockdale*, Cor. Abbott, J. Guildhall Sitt. after Trin. Term, 1818.

(e) The mere negotiation of a bill by a broker at exorbitant brokerage, the broker advancing no money himself, and being no party to the bill, will not avoid the bill under the stat. *Dagnall v. Wigley*, 11 East, 43. As to proof of usury, see the title.

(s) *Lowe v. Waller*, Doug. 736. See *Lowe v. Mazzaredo*, 1 Starkie's C. 385.

(f) *Lowe v. Mazzaredo*, 2 Starkie's C. 385. But see *Parr v. Eliason*, 1 East, 92. *Daniel v. Cartony*, 1 Esp. C. 274.

PART
IV.

against the acceptor, the latter may prove the bankruptcy of the payee previous to the indorsement (y).

Satisfaction of the bill. * 287 The defendant may, under the general issue, give evidence to show that the bill has been discharged by * payment or other satisfaction, or by the *assent* or *laches* of the holder.

The acceptor may prove in bar that the holder has received satisfaction from the drawer (z); after payment by the drawer (who is not also the payee), the bill is no longer negotiable (a), and if a bill be paid, and re-issued after maturity, the holder cannot recover (b); but a promissory note paid and re-issued before maturity is available in the hands of a *bona fide* holder, without notice (c). If the drawer, who is also payee of a bill, take it up, he may indorse it over after it is due without a fresh stamp (d); but it is otherwise where the bill is made payable to a third person (e). After twenty years, it is to be presumed that a promissory note or bill of exchange has been satisfied (f); and such a presumption may be left to a jury after the lapse of a much shorter period, although the statute of limitations has not been pleaded. The holder of a bill gives in a blank schedule under an insolvent act, this is not conclusive evidence to discharge the acceptor (g). Satisfaction to one of two parties is satisfaction to both (h). The payment of part by the acceptor to the payee, cannot be set up as a defence by the acceptor against an indorsee, without notice (i). The holder may

(y) 2 Esp. C. 611. 3 East, 322. But a bill payable to the order of the drawer, and accepted for his accommodation, does not pass to the assignees; and therefore an indorsement for value after the bankruptcy, gives a right of action. *Watson v. Hardacre*, 1 Camp. 46. 173. 3 East, 321. 12 East, 656. See above, title by transfer.

(z) 12 East, 317. 1 H. B. 89, n. Either wholly or in part, for the holder can recover the residue only from the acceptor. *Bacon v. Searles*, 1 H. B. 88.

(a) *Beck v. Robley*, 1 H. B. 89, n. But see the explanation of this doctrine in *Callow v. Lawrence*, 3 M. & S. 95; *infra*, 297.

(b) 3 Camp. 194. As to re-issuing notes, see 48 Geo. III. c. 149, s. 13.

(c) 3 Camp. 194. *Beck v. Robley*, 1 H. B. 89, n. Bayley on Bills, 66.

(d) *Callow v. Lawrence*, 3 M. & S. 95.

(e) *Beck v. Robley*, 1 H. B. 89, n.

(f) *Duffield v. Creed*, 5 Esp. 52.

(g) 3 Camp. 13.

(h) 12 East, 317.

(i) *Cooper v. Davies*, 1 Esp. 463. 1 Camp. 35. Doug. 247. (But see 2 Camp. 185.) Although the holder has taken security from

sue a prior indorser, although he has taken in execution and discharged a subsequent * one (*k*); and an acceptor sued by the holder, and discharged under an insolvent act, is still liable to the drawer (*l*). A tender is not available after the day of payment (*d*). * 288

Prior parties are not discharged by a release to subsequent parties (*m*). It will be seen that an acceptor cannot be discharged without proof of express assent by the holder (*n*). Release.

Where a bill has been renewed, and a warrant of attorney given to enter up judgment, the new security is no defence, unless judgment has been entered up (*o*); and it is no defence to an action on the first bill, that the second is outstanding (*p*).

The acceptor who has paid the amount under a forged indorsement is still liable to the supposed indorser (*q*).

It has been seen, that where the action is brought * against a drawer or indorser of a bill, it is incumbent on * 289 the plaintiff to prove that due diligence has been used in making presentment of the bill and giving notice of default. But an acceptor is not discharged by the neglect of the holder to present the bill. Discharge by laches.

Where a party accepted a bill payable at his bankers, it was held that he was not discharged by the neglect of the holder to present it for several months after it had become

another party, or discharged him out of execution (3 Esp. 46. 2 Bl. 1235. 2 B. & P. 62. A. makes a note in favour of B. without consideration, which B. indorses to C., with notice: B. becomes bankrupt—C. takes a dividend under the commission, and covenants not to sue B.; A. is still liable on the note (5 Esp. 178, *t. q.*), for the discharge of the principal discharges the surety.

(*k*) 2 Bl. R. 1523. So he may sue the drawer, after having taken the acceptor in execution, who has been discharged under the Lords Act (*Macdonald v. Bovington*, 4 T. R. 825); and the drawer may still recover from the acceptor, for the being taken in execution is no satisfaction as between the drawer and acceptor. Ibid.; and see 12 East, 317.

(*l*) 4 T. R. 825. 2 B. & P. 61.

(*d*) *Hume v. Peploe*, 8 East, 168: See 5 Ves. 350.

(*m*) 3 Esp. 46. 2 Bl. 1235. *Carstairs v. Rolleston*, 1 Marsh. 207, where it was held, on demurrer, that a release by the holder to the payee of an accommodation note did not discharge the maker, the holder not having notice of the want of consideration.

(*n*) *Vide infra*, 290.

(*o*) *Norris v. Aylett*, 2 Camp. 329. 3 East, 251.

(*p*) 3 East, 251. 5 T. R. 513.

(*q*) *Cheap v. Harley*, cited 3 T. R. 127. *Smith v. Sheppard*, Sol. Cas. 243.

PART
IV.Giving time,
&c.

due, although the bankers had funds of the acceptor in their hands, and in the mean time became bankrupts (*r*).
 The giving time to the principal in general discharges the surety; hence it is a good defence by a drawer or indorser of a bill to show that the holder has given time to the acceptor of a bill or maker of a note (*s*), or has compounded with him (*t*), or has taken a renewed bill from him, (although the indorser afterwards approve of it) (*u*), or any
 * 290 other security (*x*) (1); but if the * drawer or indorser con-

(*r*) *Sebag v. Abitbol*, 1 Starkie's C. 79.

(*s*) 3 B. & P. 366. 2 Ves. jun. 540. *Nisbet v. Smith*, 2 Bro. C. C. 579. 2 B. & P. 61. *Ex parte Smith*, 3 Bro. C. C. 1. *Tindal v. Brown*, 1 T. R. 167. 2 T. R. 186. Even although the drawer had no effects in the hands of the acceptor (*Gould v. Robson*, 8 East, 576). Forbearance to sue the acceptor after protest and notice does not discharge the drawer (*Walwyn v. St. Quintin*, 1 B. & P. 652. *Aliter*, if the forbearance be before protest, or if the holder take security from the acceptor after protest (*ibid.*) A conditional agreement to give time to the acceptor on his paying part, which condition is not fully performed, does not discharge the indorsees. *Badnall v. Samuel*, 4 Price, 174.

(*t*) *Ex parte Smith*, Co. B. L. 6th edit. 168. 3 B. C. C. 1.

(*u*) 2 Camp. 179. And see *Gould v. Robson*, 8 East, 576. There the holder, after taking part-payment from the acceptor, took another acceptance, payable at a future date; it was agreed that the holder should keep the original bill as a security, but the indorser, who was no party to the agreement, was held to be discharged. The principle as to indorsees is, that if the holder give time to a prior indorser, and then sue a subsequent one, he in effect breaks his faith with the former, per Lord Eldon, *English v. Darley*, 2 B. & P. 61. Time given to a subsequent indorser does not discharge a prior indorser. Where the bill was drawn for the accommodation of the acceptor, the giving time to the acceptor discharges the drawer, *secus*, where the action is brought against the party for whose accommodation the bill was drawn, *Hill v. Read*, 1 D. & R. 26. Giving time to the acceptor after judgment against him does not discharge the drawer, *Pole v. Ford*, 2 Chit. Rep. 125. Where the acceptor gave a second bill after the dishonour of the first, it was held to be a mere collateral security which did not discharge the drawer, *Peiry v. Claridge*, 1 B. & C. 14; 2 D. & R. 78.

(*x*) 2 B. & P. 62, per Ld. Eldon. *Qu.*

(1) [In Virginia, it has been decided that the holder of a note, who gives further time to the drawer, or enters into a new contract with him, does not thereby discharge the indorser. *Bennett v. Maule*, Gilmer, 305. In other States, the English rule is enforced. *Scarborough v. Harris*, 1 Bay, 177. *Haslet v. Ehrick*, 1 Nott & M'Cord, 116. *Moodie v. Morrall*, 1 Rep. Con. Ct. 371—*Shaw v. Griffith*, 7 Mass. Rep. 494—*Crain v. Colwell*, 8 Johns. 384. *Lynch v. Reynolds*, 16 Johns. 41. *Hubbly v. Brown & al.* *ib.* 70—*Henry v. Donaghy*, Addison's Rep. 39. *M'Fadden v. Parker*, 4 Dallas, 275. S. C. 3 Yeates, 496.]

sent to this, he is not discharged (*y*), and consequently evidence of assent may be adduced in reply to such evidence on the part of the defendant (*z*). Evidence of the mere forbearance to sue the acceptor is not sufficient (*a*).

An acceptance is *prima facie* evidence of the acceptor's having in his hands effects of the drawer sufficient to answer the amount of the bill; he is the principal debtor, and primarily liable to all parties, and cannot be discharged but by express agreement (*b*). Waver.

A complete acceptance may, in some instances, be waved by an *express* agreement to consider the acceptance at an end. Walpole, being the holder of a bill accepted by Pulteney, agreed to consider his acceptance as at an end, and wrote in his bill-book "Mr. Pulteney's acceptance at an end;" Walpole kept the bill three years without calling upon Pulteney, and then brought his action; the jury found for the plaintiff, but the Court of Exchequer granted a new trial, and the jury then found for the defendant (*c*).

The indorsees of a bill knowing that it had been accepted for the accommodation of the drawer, and possessing goods of the drawer, from the produce of which they expected payment, said, at a meeting of the acceptor's creditor's, that they looked to the drawer, and should not come upon the acceptors, in consequence of which, the latter assigned their property for the benefit of their creditors, and paid them 15s. in the pound. The drawer's goods turned out to be of * little value, and the indorsees sued the acceptors; and Lord Ellenborough said, that if the plaintiff's language amounted to an unconditional renunciation of all claim upon the acceptors, the latter were discharged; if only to a conditional promise not to resort to the acceptors, if they were satisfied elsewhere, they were not discharged, and the jury found for the plaintiffs (*e*). * 291

Black arrested Peele as acceptor of a bill drawn by Dallas, but his attorney, on finding that the bill was for the accommodation of Dallas, took a security from Dallas, and sent word to Peele that he had settled with Dallas, and that he (Peele) need give himself no further trouble; Dallas became bankrupt, and Black sued Peele, but it was held,

(*y*) *Clarke v. Devlin*, 3 B. & P. 363.

(*z*) *Ibid.* 1 B. & P. 419. 10 East, 34. 11 Ves. jun. 411. 8 East, 576. 2 Esp. C. 515. 1 B. & P. 652.

(*a*) *Walwyn v. St. Quintin*, 1 B. & P. 652.

(*b*) *Vere v. Lewis*, 3 T. R. 182.

(*c*) *Walpole v. Pulteney*, cited Doug. 248, 249.

(*e*) *Whalley v. Tricker*, 1 Camp. 35.

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that as Black had in express words discharged Peele no action could be maintained (*f*). It is however to be observed, that a mere agreement, without proof of consideration, not to sue the acceptor, will not discharge him unless he be a surety for the drawer (*g*).

The defendant may show that the plaintiff has received the whole of the consideration for the defendant's acceptance of the bill, for that is a waver of the acceptance in point of law (*h*); as, where the whole of the consideration was the consignment of goods to the defendant, and the policy of insurance upon them, and the plaintiff, the holder of the bill, signed a memorandum, stating that the defendant had refused to accept the bill, and that he the plaintiff accepted the * bill of lading and policy, and undertook to apply the proceeds in payment of the bill (*i*).

If the holder of the bill receive part of the money from the drawer, and take a promise from him upon the back of this bill for the payment of the residue at an enlarged time, it is for the jury to say whether this is not a waver of the acceptance; but it is said, that it ought to be left to them, with strong observations to show that it is (*k*). No neglect to call on the acceptor, or indulgence given to the other parties, will be evidence of a waver, so as to discharge the acceptor (*l*).

The acceptor of a bill for the accommodation of the drawer is not discharged by giving time to the drawer (*m*).

Indorsement
after due.

The defendant, by proof that the bill was indorsed to the plaintiff after it became due, places the plaintiff in the situation of the indorser, and may give any evidence in bar of the plaintiff's claim, which would

(*f*) *Black v. Peele*, cited Doug. 248. See also *Mason v. Hunt*, Doug. 297; and *Dingwall v. Dunster*, Doug. 247.

(*g*) *Parker v. Leigh*, 2 Starkie's C. 228. It was so held in *Wilson v. Smith*, on demurrer, K. B. Trin. T. 58 Geo. III.

(*h*) Doug. 297. Bayl. 91.

(*i*) *Mason v. Hunt*, Doug. 297.

(*k*) *Ellis v. Galindo*, B. R. Mich. 24 Geo. III. cited Doug. 250. Bayley, 91.

(*l*) *Laxton v. Peat*, 2 Camp. 185. [See observations on this case, in *Fentum v. Pocock*, 5 Taunt. 192.] *Dingwall v. Dunster*, Doug. 247.

(*m*) *Raggitt v. Armore*, 4 Taunt. 730. And the taking a *cognovit* for payment by instalments, from the drawer of a bill accepted for his accommodation, does not discharge the acceptor, although the holder knew that it was an accommodation bill. *Fentum v. Pocock*, 5 Taunt. 192. And see *Bank of Ireland v. Beresford* and others, 6 Dow, 237.

have defeated that of the indorser (*n*) (1); and therefore, an indorsee for value by the payee, after the bill has become due, cannot recover against the acceptor of an accommodation bill (*o*); but if the holder, before the * bill became due, could have recovered, so also may the indorsee of the bill indorsed after it has become due (*p*). But if the drawer of a bill issue it long after the date, a *bona fide* holder for value may recover, although the consideration for which the drawer delivered the bill has failed (*q*.)

If a bill be substituted for another, it is liable to the equities incident to the one in lieu of which it was given; and, therefore, where a former bill was indorsed over in breach of trust after it was due, although for a valuable consideration, it was held that the indorsee could not recover on a bill substituted for this, the defendant having received notice from the party entitled not to pay it (*r*).

An objection to a bill or note for want of a proper stamp must be taken before the bill is read.

By the stat. 31 Geo. III. c. 25, bills and notes cannot be stamped after they are made; but if a bill properly stamped be offered in evidence the Court will not inquire when it was so stamped.

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(*n*) 3 T. R. 80, & in note. 7 T. R. 431. *Good v. Coe*, cited in *Boehm v. Sterling*, 7 T. R. 427. 7 T. R. 630. [*Bowman v. Wood*, 15 Mass. Rep. 535. *Field v. Nickerson*, 13 ib. 137. *Gold v. Eddy*, 1 ib. 2.]

(*o*) 1 Camp. 19. *Charles v. Marsden*, 1 Taunt. 224.

(*p*) 1 Camp. 383. But the taker of a banker's cheque for value, nine months after the date, does not take it charged with the equity with which it was charged in the hands of the person from whom he received it, if he took it for value and without notice. *Boehm v. Sterling*, 2 Esp. C. 575. 7 T. R. 423. *Morris v. Lee*, Bayl. 233. 1 Taunt. 224. 3 Burr. 1516.

(*q*) *Boehm v. Sterling*, 7 T. R. 423.

(*r*) *Lee v. Zagury*, 1 Moore, 556.

(1) [But the same demand and notice are required when a note is indorsed after it becomes due, as in the case of an indorsement before. *Course v. Shackelford*, 2 Nott & M'Cord, 283. *Esfert v. De Condres*, 1 Rep. Con. Ct. 69. *Rugely v. Davidson*, 2 ib. 33. *Poole v. Tolleson*, 1 M'Cord, 199. *Stockman v. Riley*, 2 M'Cord, 398. *Berry v. Robinson*, 9 Johns. 121. *Dwight v. Emerson*, 2 N. Hamp. Rep. 159. *Bishop v. Dexter*, 2 Conn. Rep. 419. *Thayer v. Brackett*, 12 Mass. Rep. 450.

In Pennsylvania, however, it has been held that an indorsement of a note, after it becomes due, is an original undertaking, and no demand on the former drawer or indorser, or notice to the indorser, is necessary. *Bank of North America v. Barriere*, 1 Yeates, 360.]

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Protest, —
Alteration of
bill.

By the stat. 43 Geo. III. c. 127, a stamp of higher value, but of the same denomination, is sufficient (*s*).

A bill or note made abroad must be stamped according to the law of the country, where it is made (*t*).

* Where partners resident in Ireland, signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, and name of the drawee, and transmitted it to *B.* in England, it was held to be a bill of exchange, by relation, from the time of signing in Ireland, and that an English stamp was unnecessary (*u*).

A protest must be stamped (*x*). If a complete bill be altered in a material point, after negotiation, or after it is due (*y*), though before negotiation, a fresh stamp is necessary. But in general, an alteration, to correct a mistake before negotiation, and with the acquiescence of the parties, is immaterial (*z*). An alteration in the sum or date is a material alteration (*a*). So is the alteration of the word "date" into the word "sight" (*b*), or of the name of the banking-house where it is payable (*c*). (1). So, where a

(*s*) See *Taylor v. Hague*, 2 East, 414. *Farr v. Price*, 1 East, 55. *Chamberlain v. Porter*, 1 N. R. 30.

(*t*) *Alves v. Hodgson*, 7 T. R. 241. See *Farr v. Price*, 1 East, 55. *Taylor v. Hague*, 2 East, 414. Qu. whether an I O U requires a stamp, either as a note or as a receipt (1 Esp. C. 426, 1 Camp. 499. *Chitty*, 345), *supra*, 77.

(*u*) *Snaith v. Mingay*, 1 M. & S. 87.

(*x*) Sel. 312.

(*y*) *Bowman v. Nichol*, 1 Esp. 81. 5 T. R. 537. Although altered with the consent of the acceptor (*ibid.*) The bill in this case was originally drawn payable twenty-one days after date; whilst it was in the hands of the drawer it was altered, with the consent of the acceptor, to fifty-one days after date, and again, to twenty-four days after date, after the time of payment had expired.

(*z*) *Kennerley v. Nash*, 1 Starkie's C. 452. *Walton v. Hastings*, *Ibid.* 215. [S. C. 4 Camp. 223.] *Jacobs v. Hart*, 2 Starkie's C. 45.

(*a*) *Cordwell v. Martin*, 1 Camp. 79. 9 East, 190. *Master v. Mills*, 4 T. R. 320. 5 T. R. 367. 2 H. B. 141. 1 Anst. 225. *Trapp v. Spearman*, 3 Esp. C. 57.

(*b*) *Long v. Moore*, 3 Esp. C. 155. n. But see 1 Taunt. 420.

(*c*) *Tidmarsh v. Grever*, 1 M. & S. 735.

(1) In a note payable in "merchantable neat stock," an insertion of the word "young" after the word "merchantable" is a material alteration, and if made by the promisee designedly, destroys the validity of the note; and the promisee is not at liberty to prove the contract by other evidence.—*Martendale v. Follet*, 1 N. Hamp. Rep. 95. But by inserting the word "good" before "merchantable wool," the note is not avoided; for the law would have intended

promissory note on the day after the delivery to the payee, and expressed to be for value received, was altered by the addition of the words "for the good-will of a lease and trade" (*d*), the Court held that this alteration was material, because it afforded evidence of a fact which otherwise must * have been proved *aliunde*, and pointed out to the holder to inquire whether the consideration had really passed.

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The introduction of words after the acceptance of a bill, which do not affect the responsibility of the parties, is immaterial (*f*). Thus it has been held, that the introduction of a place of payment without the knowledge of the acceptor was immaterial, since it did not alter his liability (*g*).

An exchange of acceptances is a sufficient negotiation to render a new stamp necessary (*h*) ; and so is the delivery to the drawer, of a bill drawn for his accommodation, and pay-

(*d*) *Knill v. Williams*, 10 East, 431.

(*f*) *Marson v. Petit*, 1 Camp. 82, *n.* *Jacobs v. Hart*, 2 Stark. C. 45.

(*g*) *Marson v. Petit*, 1 Camp. 82, *n.* 3 Esp. C. 57. Such an alteration would now be material, in consequence of the late decision in the House of Lords, in *Rowe v. Young*, *supra*, 238. A bill accepted generally, altered by the drawer, so as to make it payable at a particular place, is avoided, *Cowie v. Hallsall*, 4 B. & A. 197. An accommodation bill is not issued so as to be incapable of alteration until it comes into the hands of one entitled to treat it as an available security. *Downes v. Thompson*, 5 B. & A. 674.

(*h*) *Cordwell v. Martin*, 1 Camp. 79. 9 East, 190.

that the wool should be good. *The State v. Cilley*, cited *ibid.* p. 97. So in *Hunt v. Adams*, 6 Mass. Rep. 519, the insertion of the word "year," in the date of a note, was held not to avoid it, because the law would have supplied the word. But where a person not present at the execution of a note, afterwards subscribed his name thereto as a witness, at the instigation of the payee, it was held to avoid the note—as by a statute of Massachusetts, a note that has an attesting witness is not within the statute of limitations. *Homer v. Wallis*, 11 Mass. Rep. 309.

An alteration in the date of a note by the payee, whereby the time of payment is retarded, avoids it, although in the hands of an innocent indorsee for a valuable consideration. *Bank of U. States v. Russell*, 3 Yeates, 391. But an alteration in the date of an assignment on a note does not affect the claim of the assignee on the drawer. *Griffith v. Cox*, 1 Overton's Rep. 210.

In *Pepoon v. Stagg*, 1 Nott & McCord, 102, it was held that the insertion, by the holder of a due bill or promissory note, of the words "or order," destroyed its validity.

The law will not presume that an alteration, apparent on the face of a note, was made after its execution—but this, it seems, is a question for the jury to decide. *Cumberland Bank v. Hall*, 1 Halsted's Rep. 215.]

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able to his own order (i). So where a bill indorsed by the drawer was left with the drawee for acceptance, who altered the *date* before he accepted it (k).

Where the drawee, upon presentment of the bill for acceptance, altered it as to the time of payment, and accepted it so altered, it was held that he thereby vacated the bill as to the drawer and indorsers; but that as the holder acquiesced, it was good as against him and the acceptor (l).

An alteration of the bill in the hands of the payee will defeat the action of the indorser, although he was not privy to the alteration (m).

- * 296 * If a note be signed by *A.*, and in consequence of a subsequent arrangement *B.* sign the note as a surety, he is not bound without a new stamp (n).

Where a bill or note is void for want of a proper stamp, the plaintiff may go into evidence of the original consideration (o).

Where the alteration is made by consent of the parties, and *before negotiation*, a new stamp is unnecessary (p); as, where *A.* being indebted to *B.*, the latter drew a bill upon him at three months for the amount, and the bill being sent to *A.* for acceptance, he requested the time to be altered from three months to five, to which the drawer consented (q).

It is incumbent on the party who objects on the score of alteration to prove that the alteration apparent on the face of the bill was made previous to negotiation (r).

Where the alteration is made to *correct a mistake*, and in furtherance of the intention of the parties, a new stamp is unnecessary, as where, in a bill intended to be negotiable and payable to the defendant, the drawer, the words "or

(i) *Calvert v. Roberts*, 3 Camp. 343.

(k) *Outhwaite v. Luntley*, 4 Camp. 179.

(l) *Paton v. Winter*, 1 Taunt. 420. And held, that no action would lie at the suit of the holder against the acceptor for rendering the bill invalid. But see *Walton v. Hastings*, 1 Starkie's C. 215. S. C. 4 Camp. 223. *Long v. Moore*, 3 Esp. C. 155. n.

(m) *Master & others v. Miller*, 4 T. R. 320. 5 T. R. 367. 2 H. B. 141. 1 Anst. 225.

(n) *Clark v. Blackstock*, Holt's C. 474.

(o) 1 East, 58. 6 T. R. 52. 7 T. R. 241. 2 B. & P. 118. *Brown v. Watts*, 1 Taunt. 353.

(p) *Johnson v. The Duke of Marlborough*, 2 Starkie's C. 215. *Kennerley v. Nash*, 1 Starkie's C. 452.

(q) *Kennerley v. Nash*, 1 Starkie's C. 452.

(r) *Johnson v. The Duke of Marlborough*, 2 Starkie's C. 215.

order" were omitted, and the bill having been indorsed over to the plaintiff the next day, was returned by him to the drawer on the same day, and the mistake was then rectified(s), the Jury finding upon the evidence that such was the original intention of the parties, the Court of King's Bench * afterwards held that the alteration was allowable. But where a bill dated on the 1st of August, was drawn at two months date, payable to the order of the drawer, and after acceptance by the defendant was re-delivered by him to the drawer, as a security for a debt, and after the latter had kept it twenty days the date was altered to the twenty-first, by the consent of the acceptor, and before the indorsement and delivery to a third person, it was held that a new stamp was necessary, since the bill was drawn according to the original intention of the parties, and was available in that form (t).

A bill properly stamped and put into circulation, and afterwards taken up by the drawer, may again be circulated without a new stamp. It is negotiable in *infinitum*, till it has been paid by or discharged on behalf of the acceptor (u); and therefore, where the drawer of a bill payable to his own order, indorsed it over to A., who indorsed it to B., who returned it to the drawer on payment of the amount by the latter, having first struck out his own and A.'s indorsement, and the drawer indorsed it to the plaintiff after it was due, it was held that he might recover against the acceptor without a new stamp.

In order to prove that a bill dated at Paris was drawn in England, it has been held to be insufficient to prove that the drawer was in England at the time of the date (x).

The drawer may prove that he tendered the amount * in a reasonable time after notice of the dishonour (y). * 298

(s) *Kershaw v. Cox*, 3 Esp. C. 246, Cor. Le Blanc, J. and afterwards by the Court of K. B. And see *Bathe v. Taylor*, 15 East-412. *Cole v. Parkin*, 12 East, 471. [Swift on Bills, 266.]

(t) *Bathe v. Taylor*, 15 East, 412.

(u) Per Ld. Ellenborough, in *Callow v. Lawrence*, 3 M. & S. 97. Note, this case was held to be distinguishable from that of *Beck v. Robley* (1 H. B. 89, in note), for there the bill was payable not to the order of the drawer, but of a third person; and if the drawer on taking up the bill, could have transferred it, the payee would have been wrongfully made liable. (1)

(x) *Abraham v. Du Bois*, 4 Camp. 269.

(y) *Walker v. Barnes*, 1 Marsh. 36. S. C. 5 Taunt. 240.

(1) [See *Guild v. Eager & al.* 17 Mass. Rep. 615. *Mead v. Small*, 2 Greenleaf, 207. *Bryant v. Ritterbush & ux.* 2 N. Hamp. Rep. 212.]

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A tender on the day following that of the notice was held to be in time (z).

III. It is a general rule in criminal cases, that no one can prove that a bill drawn, accepted or indorsed, in his name, is a forgery (a); (1) but it seems that the rule is to be confined to criminal proceedings, although it has been held in a civil case that the supposed drawer of a bill was not competent to prove that he did not draw it (b). A party to a bill is competent to prove that it is void (c), although the contrary was once held (d); (2) and a party to a bill is

(z) Ibid.

(a) Unless he has been rendered competent by payment, &c. See tit. *Forgery*.

(b) 12 Mod. 345. Holt, 297. But see tit. *Forgery*.

(c) *Walton v. Shelley*, 1 T. R. 296, where it was held that an indorser was not competent to prove the consideration to have been usurious.

(d) 7 T. R. 62. 1 Esp. C. 332. Peake's L. Ev. 181. A declaration by a holder under whose indorsement the plaintiff claims, that after the bill was due the amount was settled between himself and the acceptor, is not evidence for the latter, for the holder may be called. *Duckham v. Wallis*, 5 Esp. C. 251. A indorsed a bill to B. as a security for a running account; after the bill became due B. indorsed it to C.; an entry or declaration by B., as to the state of the accounts, is not evidence for A. unless at least it was cotemporary with the indorsement to B. *Collenridge v. Farquharson*. 1 Starkie's C. 359.

(1) [See American cases on this point, Post. p. 583, note (1)].

(2) [In Connecticut, the English doctrine is adopted, that a party to a negotiable instrument, who is divested of his interest, is a competent witness to prove it void in its creation. *Townsend v. Bush*, 1 Conn. Rep. 260. See Swift's Evidence, 96-105. In South Carolina, the Constitutional Court has recently expressed a doubt what the law on this subject is, in that State. *Haig v. Newton*, 1 Rep. Con. Ct. 423. But in New Hampshire, Massachusetts, New York, and Pennsylvania, it is held that a party, who has put his name to a negotiable instrument, is not a competent witness to prove that, at the time he gave it currency, it was void. *Houghton v. Page*, 1 N. Hamp. Rep. 60. *Churchill v. Suter*, 4 Mass. Rep. 156. *Warren v. Merry*, 3 ib. 27. *Man'ing v. Wheatland*, 10 ib. 502. *Hartford Bank v. Barry*, 17 ib. 94. *Winton v. Saidler*, 3 Johns. Cas. 185. *Coleman v. Wise*, 2 Johns. 165. *Skilding & al. v. Warren*, 15 Johns. 270. *Stille v. Lynch*, 2 Dallas, 194. *Shaw v. Wallis*, 2 Yeates, 17.

In Massachusetts, this rule of evidence has been extended to an agent who signed a negotiable note for a corporation. *Packard v. Richardson & al.* 17 Mass. Rep. 122. But in North Carolina, it has been decided that one who signs an instrument as attorney for another is not within the rule. *Alston v. Jones*, 2 Hayw. 298.

This rule, in all courts where it is recognized, is confined to negotiable instruments, *Doe v. Stokes*, 2 Hawks, 235. *Croft v. Arthur*, 3 Dessaus.

competent to defeat or support the action, unless he be directly interested in the event, or unless the verdict would be evidence for or against him.

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The incompetency of a party to the bill results from the consideration, that if his testimony were to prevail he would stand in a better relative situation than he would do if a contrary verdict were given. In the usual and natural course of a bill *in theory*, every party to it seems to be competent. The transfer of the bill is the assignment of a debt due from the drawee to the drawer, the drawee having money of the drawer in his hands. In such a state of things, the drawer and indorsers, and drawee or acceptor, must, it seems, in general be competent, since ultimately the drawee or acceptor will be liable for the amount in case it should be recovered from any other party; and no party can either gain or lose by aiding or opposing a * recovery in an action between any other parties. In *practice*, this relative situation of the parties is liable to constant disturbance; and as bills of exchange are used as the instruments of adjusting the most complicated and varied transactions, the relative situation of the parties is altered accordingly. The following decisions have taken place on this subject:

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In an action by an indorsee against the acceptor of a bill payable to the order of the drawer, the latter is competent to prove usury (*f*), or that the bill has been paid (*g*); but it would be otherwise if the bill were accepted for the ac-

Drawer.

(*f*) 5 Esp. C. 119.

(*g*) *Humphrey v. Moxon*, Peake's C. 52. *Vide etiam*, *Phetheon v. Whitmore*, Peake's C. 40. *contra*. *Adams v. Lingard*. Peake's C. 117. *accord*. *Jordaine v. Lashbrook*. 7 T. R. 601.

3 Dessaus. 223. *Pleasants v. Pemberton*, 2 Dallas, 196. *Baring v. Shippen*, 2 Binney, 168. *McFerran v. Powers*, 1 Serg. & Rawle, 102. *Inhabitants of Worcester v. Eaton*, 13 Mass. Rep. 368. *Loker v. Haines*, 11 ib. 498. This rule, it seems, does not apply to bills of lading. *Brown & al. v. Babcock & al.* 3 Mass. Rep. 29. The master of a vessel is competent to impeach the validity of an invoice and bill of lading, in an action by the owner against underwriters. *Blagg v. Phoenix Ins. Co.* Circuit Court, April 1811. Wharton's Digest, 270. Nor does the rule extend to papers which have not been negotiated, but remain in the hands of the original parties. *Blagg v. Phoenix Ins. Co. ubi sup.* *Fox & al. v. Whitney*, 16 Mass. Rep. 118. In *Baird v. Cochran*, 4 Serg. & Rawle, 399, the indorser of a note, negotiated after it became due, was held competent to invalidate it by his testimony.

A party to a negotiable instrument is a competent witness to prove any subsequent facts, which do not impeach the original legality of the instrument. *Warren v. Merry, ubi sup.* *Barker v. Prentiss*, 6 Mass. Rep. 430. *Parker v. Hanson*, 7 ib. 470. *Powells v. Waters*, 17 Johns. 176.]

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commodation of the drawer, who would then be liable to the costs of the defendant, if the plaintiff succeeded (*h*).

In an action by the indorsee against the acceptor, the drawer is competent to prove the defendant's hand-writing (*i*).

Maker.

A joint maker of a note is a competent witness for the plaintiff, for he stands indifferent, being liable, in the event of the plaintiff's failure, to an action at the suit of the plaintiff, for the whole, with a claim on the defendant for a moiety, and in case the plaintiff should succeed, being liable to the defendant for contribution (*k*).

In an action against the indorser of a note the maker is competent to prove that the date has been altered (*l*).

Acceptor.

In an action by the holder against the drawer, the acceptor is competent to prove that he had no effects of the drawer in his hands (*m*).

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* A payee is competent in an action by an indorsee against the acceptor, to prove that the bill was originally void for want of a proper stamp (*w*), having been made in London, although dated at Hamburg.

Indorser.

A prior indorser of a bill, in an action by an indorsee against the drawer, is competent to prove a promise to pay the bill after it became due (*n*).

The payee of a bill (drawn for his accommodation) who has indorsed it to the plaintiff, is competent, in an action against the drawer, to prove that he indorsed it for a valuable consideration, for if the plaintiff should fail, he would be liable to him to the amount of the bill; if he should succeed, he would be liable to the same amount to the defendant (*o*).

An indorsee is competent, in an action by the holder against the drawer, to prove the payment by the drawer of money into his hands, to take up the bill, and that he has satisfied the bill, for he is liable, at all events, either to the

(*h*) *Jones v. Brooke*, 4 Taunt. 464.

(*i*) *Dickenson v. Prentice*, 4 Esp. C. 32. The objection in this case was, that forgery was imputed to the witness by the defendant.

(*k*) *York v. Blott*, 5 M. & S. 71. See Str. 35.

(*l*) *Levy v. Esser*, Chitty, 284. 4 Esp. C. 37. Peake's L. Ev. 102.

(*m*) *Staples v. Okines*, 1 Esp. C. 332. Peake's L. E. 154.

(*w*) 7 T. R. 601. 1 Esp. C. 10. 85. 298. 332. Peake's C. 40. *Rich v. Topping*, Peake's C. 224. 1 Esp. C. 177. See also *Cooper v. Davis*, 1 Esp. C. 463.

(*n*) *Stevens v. Lynch*, 2 Camp. 332.

(*o*) *Shuttleworth v. Stephens*, 1 Camp. 407.

holder or to the drawer for the amount of the bill (*p*). So in an action against the * maker of a note, an indorser is a competent witness to prove that it has been paid (*q*). (1) But a drawer or indorser of a bill or note accepted for his accommodation is not a competent witness for the defendant in an action against the acceptor or maker; for he would be liable for the costs if the plaintiff succeeded (*r*).

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Competency.
Indorser.

(*p*) *Birt v. Kershaw*, 2 East, 458. The Court seems to have considered that the further liability of the witness to the drawer in respect of the costs of the action, occasioned by the neglect of the witness to pay over the money, made no difference (according to *Iderton v. Atkinson*, 7 T. R. 481). It would be difficult to support, upon principle, the position, that the getting rid of a legal liability to the costs of an action did not disqualify a witness; but the decision itself may be sustained upon the consideration that, as a mere indorser, the witness was competent, and that as the mere agent of the drawer in paying the money over to the holder of the bill, he was also competent to prove such payment according to the general rule as to the competency of agents (*supra*, 62). In strictness, the objection to his competency rested on his liability to the drawer for the consequences of his negligence in not having paid over the money, which was wholly independent of his being a party to the bill; if he had been a mere stranger to the bill, but employed as agent to pay over the money, the same objection might have been taken and overruled on the ground of the general competency of an agent. [See 2 Phil. Ev. 15.]

(*q*) *Charrington v. Milner*, Peake's C. 6.

(*r*) *Jones v. Brooke*, 4 Taunt. 464; *Maundrell v. Kennett*, 1 Camp. 408; *Bottomley v. Wilson*, 3 Starkie's C. 148; *Williams v. Keates*, Mann. Ind. Witness, 6. *Secus*, if he has subsequently become a bankrupt, and obtained his certificate. *Brind v. Bacon*, 5 Taunt. 183. For by the stat. 49 G. 3, c. 121, s. 8, the drawer is discharged of the costs, (see tit. *Surety*, &c. Part IV.) to which he would otherwise be liable; the cases of *Maundrell v. Kennett*, 1 Camp. 408. *Pinkerton v. Adams*, 2 Esp. C. 612, were previous to the stat. See also *Scott v. Lifford*, 1 Camp. 249. Where *A.* and *B.* having dissolved partnership, an action was brought by the acceptor of a bill afterwards drawn in the name of the firm, and *A.* pleaded his subsequent bankruptcy and certificate, and *nol. proe.* as to him; it was held that *A.* was a competent witness for *B.* on the ground that the bill (as stated by *A.*), was drawn for his accommodation alone, and was therefore barred by the certificate. *Moody v. King*, 2 B. & C. 558.

One who having received a bill to get it discounted for the drawer, delivers it to the plaintiff, in payment of a debt, is not competent to prove the fact in an action against the drawer, for he would be liable to the costs if the plaintiff succeeded. *Harman v. Lasbrey*. Holt's C. 390.

(1) [In South Carolina and Massachusetts, the maker of a note, unless released, is not a competent witness for the indorser in an action by the indorsee against him. *Haig v. Newton*, 1 Rep. Con. Ct. 423. *Petree v. Butler*, 14 Mass. Rep. 303. But it is held differently

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Competency.
Indorser.

It has been said, that one whose name is on the bill as an indorser is not competent to prove that the property is in himself, and that he indorsed it to the plaintiff without consideration (s).

A party in prison on a charge of having forged the bill is competent to prove payment of it in an action brought to recover it (t).

Where a bill has been drawn by one partner in fraud of the rest, to pay a separate creditor, a co-partner is a competent witness for the acceptor in an action against him by the creditor, to prove the want of authority, for if the plaintiff should succeed, and the acceptor recovered against the firm, the witness would have his remedy over against the fraudulent partner (v); and it was held that the intervening bankruptcy of the debtor partner made no difference.

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Effect of a bill
or note in evi-
dence.

* IV. A promissory note is *prima facie* evidence of money lent by the payee to the maker (u), or of a balance due from the maker to the payee upon an account stated (x). (1) And the acceptance of a bill of exchange payable to the order of the drawer is *prima facie* evidence of money had and received by the acceptor to the use of the drawer (y).

(s) 1 Esp. 85. *Buckland v. Tankard*, 5 T. R. 578; B. N. P. 288. But *qu.* for if the plaintiff recovered, he would still be but a trustee for the witness.—(2).

(t) 3 Esp. C. 62.

(v) *Ridley v. Taylor*, 13 East, 176.

(u) *Carter v. Palmer*, 12 Mod. 380, per Holt, C. J.; 3 Burr. 1525. *Clarke v. Martin*, Ld. Raym. 758.

(x) *Storey v. Atkins*, 2 Str. 719; B. N. P. 136, 7. *Harris v. Huntbach*, 1 Burr, 373. *Pauley v. Brown*, Cor. Abbott, J. Devon Lent Ass. 1818.

(y) *Thomson v. Morgan*, 3 Camp. 101. *Scholey v. Walsby*, Peake's C. 24. Where the bill is payable to a third person, the presump-

ently in England and in New York, *unless* the note was made and indorsed for the accommodation of the maker (4 Taunt. 464)—in which case, as the indorser is regarded as a surety, and would, if the endorsee recovered against him, be entitled to charge the maker, not only with the amount of the note, but also with the costs he had been compelled to pay, his liability for costs renders him interested to defeat the action. *Hubbly v. Brown & al.* 16 Johns. 70. See also *Skilding & al. v. Warren*, 15 Johns. 275. *Wilson v. Lenox & al.* 1 Cranch, 194. *Duncan v. Pindall*, 4 Bibb, 330.]

(1) [An action cannot be supported upon the common money counts against one of the makers of a promissory note, who signed it as surety only for the other maker. *Wells v. Girling*, 3 Moore, 79. S. C. 8 Taunt. 737.]

(2) [The case of *Buckland v. Tankard* was denied to be law in *Page v. Weeks*, 13 Mass. Rep. 201.]

A bill is also, it is said, evidence of money lent by the payee to the drawer (z). So, it has been held, that either a bill or note is evidence of money had and received by the acceptor or maker to the use of the holder. (1)

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dence.

The theory of a bill of exchange is, that a bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports that the acceptor is a debtor to the drawer to the amount of the bill; hence, it has been said, that the effect of the transaction is to appropriate, by an agreement between the parties, so much property to the account of the holder of the bill (a). It is also said, that a bill or note * is evidence of money paid by the holder to the use of the acceptor or maker (b.) This doctrine has, however,

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tion does not arise without proof of consideration, and his remedy against the acceptor is confined to the bill. Per Lawrence, J. *Cowley v. Dunlop*, 7 T. R. 579.

(z) Bayley, 163, citing *Clarke v. Martin*, Ld. Raym. 758; 12 Mod. 380; 3 Burr. 1525. *Smith v. Kendall*, 6 T. R. 123.

(a) *Vere v. Lewis*, 3 T. R. 182, where it was held, that the acceptance of a bill payable to a fictitious payee was evidence of value received by the acceptor from the drawer, to support an action by the holder for money paid, or money had and received. In *Tatlock v. Harris*, 3 T. R. 174, where an indorsee recovered against the acceptor on a similar bill, there was proof of value received by the acceptor from an indorser. In *Dimsdale v. Lanchester*, 4 Esp. C. 201, Ld. Ellenborough said, "Where a person puts his name to a promissory note, he thereby acknowledges that he has money in his hands of the payee of the note, and undertakes to pay it to the party legally entitled to receive it, that is, to the person who has paid for it a good consideration, and thereby become the legal holder of the note." In *Grant v. Vaughan*, Burr. 1516, it was held by Ld. Mansfield and the other Judges, to be clear beyond dispute that the *bona fide* bearer might recover against the maker as for money had and received to his use. See also *Williams v. Everett*, 14 East, 582. 1 East, 98. But see *Waynam v. Bend*, 1 Camp. 175, where, in an action by the indorsee against the maker of a promissory note for value received, and payable to the bearer, Ld. Ellenborough was of opinion that the note was not evidence under the money counts, without proof of value received by the defendant to the use of plaintiff; the cause was not decided on this ground. See also *Hard's case*, 1 Salk. 23. *Hodges v. Steward*, 1 Salk. 125; and below, note (c).

(b) Bayley, 163. *Vere v. Lewis*, 3 T. R. 182. *Tatlock v. Harris*, 3 T. R. 174.

(1) [See *Smith v. Smith*, 2 Johns. 235. *Cruger v. Armstrong*, 2 Johns. Cas. 5. *Arnold v. Crane*, 8 Johns. 79. *Saxton v. Johnson*, 10 Johns. 418. *Raborg & al. v. Peyton*, 2 Wheat. 385. *Mandeville & al. v. Riddle*, 1 Cranch, 290. *Lindo v. Gardner*, *ibid.* 343. Appendix to 1 Cranch.]

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evidence.

been questioned (c), and it may be doubted * whether the plaintiff, if he resort to the common counts, must not prove that the defendant has in fact received the amount of the bill. At all events, whenever there is a doubt whether the plaintiff can recover on the special counts, it is desirable to be prepared with evidence (according to the fact) to show that the defendant has received money for the purpose of the bill.

An action of *indebitatus assumpsit* will not lie upon the acceptance of a bill of exchange (d); for an acceptance is but a collateral engagement, but must be used as evidence of some duty, as money lent, or money had and received,

(c) See *Gibson v. Minett*, 1 H. B. 602, where it was held that a *bona fide* indorsee for value might recover against the acceptor of a bill of exchange made payable to a fictitious payee, as upon a bill payable to the bearer. In that case L. C. B. Eyre, who gave his opinion in a very elaborate judgment against the decision of the Court of K. B. in favour of the plaintiff, seems to have admitted that the acceptance of a bill would be evidence of a duty as for money lent, or money had and received, upon those counts, but considered those counts to be out of the question, the finding by the special verdict being insufficient to raise the question upon these points. He said, "It has been expressly determined that a general *indebitatus assumpsit* will not lie upon a bill of exchange, but the *indebitatus assumpsit* must be for some duty, such as money lent, &c. and the bill is offered as evidence of that duty." He adds, "The presumptions of evidence which the writing affords, have no application to the *assumpsit* for money paid by the payee or holder of the bill to the use of the acceptor; it must be a very special case which will support such an *assumpsit*. See also *Waynam v. Bend*, 1 Camp. 175. At common law, if a promissory note was made payable to J. S. or bearer, the bearer could not bring an action on the note in his own name, but was obliged to sue in the name of the principal. See *Nicholson v. Sedgwick*, 1 Salk. 125. n. 1 Ld. Raym. 180. A difficulty which could not have arisen, if he could have maintained the action for money had and received.

In the case of *Were v. Taylor*, Cor. Ld. Ellenborough, C. J. (cited 1 Camp. 131), where the bill was made payable to a fictitious payee, and declared on as payable to the bearer, Ld. Ellenborough said that the cases on the subject had been much doubted; and the plaintiffs failing to show that the value of the bill had been received by the defendant, were nonsuited. And in the subsequent case of *Bennett v. Farrell*, 1 Camp. 130, where the payee was also a fictitious person, Ld. Ellenborough said that he would admit evidence of value having been received by the defendant; and that if the plaintiff's money had found its way into the defendant's hands, he should not be allowed to retain it, for then he had money in his hands belonging to another person, which might be recovered from him as money had and received. The plaintiff, failing to prove this, was nonsuited.

(d) *Hard's case*, 1 Salk. 23; and per C. B. Eyre, *Gibson v. Minett*, in error, 1 H. B. 602.

for which an *indebitatus assumpsit* will lie (e). And in such case, it is but evidence, and consequently the presumption which the writing affords may be encountered, and contradicted by other evidence, and the jury are to draw their conclusion of fact, that so much money was lent, or so much money was had and received, from all the evidence in the case (f).

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In the case of *Whitwell v. Bennett* (g), where the * plaintiff, an indorsee, could not recover on the special counts by reason of variance, and it was proved that when the defendant accepted the bill (for 30*l.*), he stated, that although the drawer had not remitted the amount, he expected that he would do so, and that as he had a bill of his for 80*l.*, which would be paid, he would take all risks upon himself, the Court held, that if the bill had been paid the count for money had and received would have been maintainable, on the ground of the specific appropriation of the particular sum to the payment of the plaintiff's demand; but that as the action was on the bill for 30*l.*, it was a surprise on the defendant to call for proof of the non-payment of the other bill, and therefore that payment ought not to be presumed.

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An indorsement of a bill or note is evidence of money lent by the indorsee to the indorser (h).

It has also been said, that a bill is *prima facie* evidence of money had and received by the drawer to the use of the holder, or of money paid by such holder to the use of the drawer (i). This, however, appears to be very questionable (k) (1).

A receipt upon a bill is *prima facie* evidence of payment by the acceptor (l).

If the plaintiff fail to prove the bill by reason of variance, or where the bill is void for want of a proper stamp, he may resort to the common counts if they be applicable (m),

Resort to the common counts.

(e) Per Eyre, L. C. B. 1 H. B. 602, *supra*, note (c).

(f) Ibid.

(g) 3 B. & P. 559.

(h) Bayley, 164, cited *Kessebower v. Sims*, MS. C.

(i) See the authorities cited Bayley on Bills, 163.

(k) *Vide supra*, p. 303. [2 Phil. Ev. 14.]

(l) Peake's C. 25. Peake's L. E. 221. [See 2 Camp. 439.]

(m) *Alves v. Hodgson*, 7 T. R. 241. *Tyte v. Jones*, 1 East, 48. 1 Esp. C. 245. 4 T. R. 320. But he cannot, where the bill is made

(1) [It has been decided in New-York, that an indorsed note is evidence, under a count for money had and received, in an action by the indorsee against the maker. *Pierce v. Crafts*, 12 Johns. 90.]

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evidence.

and there be a privity of contract * between the parties, and may give evidence of the original consideration on which the note was given (o).

In an action by the indorsee of a bill against one who has received money from the acceptor for the purpose of taking up the bill, any defence may be set up of which the acceptor could have availed himself (p).

An accommodation acceptor who defends for the drawer may recover costs as money paid to the use of the drawer, without an undertaking in writing (q).

Where an acceptor of a bill finding that he cannot discharge it, pays part to the drawer to take it up, the money is had and received to the use of the holder (r).

Proof of the delivery and payment of a cheque is not *prima facie* evidence of a debt, or of a set-off, unless it be shown under what circumstances it was given (s).

Operation of,
in payment,
&c.

Bank-notes cannot be followed by the legal owners into the hands of *bona fide* holders who took them in payment, without notice (t).

If a seller of goods take bills or notes for them, without agreeing to run the risk of their being paid, and they turn out to be worth nothing, it will be no payment (u); and if a draft or bill given in payment be dishonoured, the party receiving it may consider it as a nullity (x). And a bill of

* 307 exchange written on a * wrong stamp is no payment, al-

payable to a fictitious payee, and declared on as payable to the bearer (1 H. B. 313. 569). Neither can he where he proves a mere promise to pay, without producing the bill, or proving its destruction. *Dangerfield v. Wilby*, 4 Esp. 159.

(o) *Farr v. Price*, 1 East, 55. *Brown v. Watts*, 1 Taunt. 353. *Wilson v. Kennedy*, 1 Esp. C. 245. *Manley v. Peel*, 5 Esp. 121. See also *supra*, note (m).

(p) 1 Camp. 372. Cro. J. 687. 2 Roll. R. 440.

(q) 1 Esp. 162.

(r) *Baker v. Birch*, 3 Camp. 107.

(s) *Aubert v. Walsh*, 4 Taunt. 293.

(t) *Lowndes v. Anderson*, 13 East, 130. *Solomons v. Bank of England*, *ibid.*

(u) *Owenson v. Morse*, 7 T. R. 64.

(x) *Puckford v. Maxwell*, 6 T. R. 52; where a draft had been given when the defendant was arrested, it was held that he might be again arrested on the same affidavit, the draft having been dishonoured. And see *Brown v. Kewley*, 2 B. & P. 518. In Cam. Scacc. no interval; and *Hickling v. Hardy*, 7 Taunt. 312; where the bill has been given in payment for goods, the payee may maintain an action for goods sold and delivered, although the time of credit has not expired, and although he has not returned the bill. *Hickling v. Hardy*, 7 Taunt. 312. *Mussen v. Price*, 4 East, 147.

though the parties would have paid it if presented in due time (*y*). But the indorsing a bill or note in payment of a debt may be pleaded in satisfaction of the demand (*z*).

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Where an acceptor, in order to pay his acceptance, drew another bill which was dishonoured by the drawee, but no notice was given, it was held that the acceptor was entirely discharged (*a*).

Effect of, in
evidence.—
To prove pay-
ment.

If *A.* and *B.* exchange bills absolutely, the property is changed, and does not re-vest in either, although the bill which he has received is dishonoured (*b*); otherwise, when the exchange is conditional (*c*). But it seems, that if *B.* knew that his own bill was worthless, the whole transaction would be vitiated by the fraud, and the property in *A.*'s bill would not be altered. Formerly, where a bill was paid in discharge of a debt, but there was no contract that the taking the bill should be a discharge of the debt, it was held to be no payment, unless the creditor received the money (*d*), although the creditor had neglected to present the bill for payment or to give notice of the dishonour. But by the stat. 4 & 5 Ann. c. 9, s. 7, the acceptance of such a bill in satisfaction of a debt, * shall be * 308 deemed payment to the creditor if he do not take his due course to obtain payment of it.

For the evidence upon an indictment for forgery, see tit. *Forgery*.

BILL OF LADING.

A BILL of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight (*e*). Such instruments are negotiable by the custom of merchants (*f*) (1), and are transferred by the shipper's indorsement (*g*); and there is no distinction be-

(*y*) *Wilson v. Vysar*, 4 Taunt. 288.

(*z*) *Kearlake v. Morgan*, 5 T. R. 513.

(*a*) *Bridges v. Berry*, 3 Taunt. 130. See also *Bevan v. Hill*, 2 Camp. 381.

(*b*) *Hornblower v. Proud*, 2 B. & A. 327.

(*c*) Ibid.

(*d*) *Clarke v. Mandal*, 1 Salk. 124.

(*e*) Per Ld. Loughborough, 1 H. B. 358.

(*f*) 5 T. R. 683, *Lickbarrow v. Mason*.

(*g*) *Lickbarrow v. Mason*, 2 T. R. 63. *Haille v. Smith*, 1 B. & P. 564.

(1) [See Ante, p. 298, note.]

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tween a bill of lading indorsed in blank, and an indorsement to a particular person (*h*).

The indorsement and delivery of a bill of lading is *prima facie* an immediate transfer of the legal interest in the cargo (*i*). And a bill of lading signed by a deceased master of a vessel for the delivery of goods to a consignee, is evidence of property in the consignee to show an insurable interest in the goods (*k*) (1).

An assignment of the bill of lading to a third person for a valuable consideration divests the consignor's right of stoppage in *transitu* (*l*).

(*h*) 2 T. R. 63.

(*i*) 1 T. R. 215, 216. *Hibbert v. Carter*, 1 T. R. 745. [See *Chandler v. Belden*, 18 Johns. 157.]

(*k*) *Haddow v. Parry*, 3 Taunt. 305. *Supra*, Vol. I. p. 314.

(*l*) *Lickbarrow v. Mason*, 2 T. R. 63. 5 T. R. 367. 683. *Secus*, where a bill of lading is assigned by the vendee to his factor, although he has drawn upon him to the amount of the consignment, it being clear that it was not intended that the goods in question should be appropriated to the payment of the particular bills, and the goods not having reached the factor's hands, and no specific pledge having been made. *Patten v. Thompson*, 5 M. & S. 350. See *Kinloch v. Craig*, 3 T. R. 119. 783. [See *Moore v. Sheredine*, 2 Har. & M'Hen. 453.]

(1) [A bill of lading, stating the property to belong to A. & B. is not conclusive evidence, and does not estop A. from showing that the property belongs to another, in an action against an insurer. *Maryland Insurance Co. v. Ruden's Administrator*, 6 Cranch, 338. A bill of lading subscribed by the owner of a vessel, and by the master, is evidence, against the owner of the goods, of the amount freighted, but cannot be declared on as the foundation of an action for the freight. *Shalzell v. Hart*, 2 Marsh. 192. In an action for wages, by the executors of a master of a vessel, against the owners, a bill of lading, signed by the captain in a foreign port, was allowed to be given in evidence, to show that by the usage of trade at a certain port, the captain was entitled to certain privileges. *Vicary's Executors v. Ross & al.* 1 Yeates, 38. But a copy of a bill of lading, not signed by the captain, but verified by an affidavit, was ruled not to be admissible. *Wood v. Roach*, 2 Dallas, 180. S. C. 1 Yeates, 177.]

How far and when a bill of lading, which acknowledges the freight of goods received on board to be paid, can be contradicted by the parties concerned, see *Portland Bank v. Stubbs*, 6 Mass. Rep. 422. If a master of a vessel sign a bill of lading, acknowledging that the goods are in good order, it seems that in an action against him for not delivering them in good order, no evidence is admissible to prove that they were not in good order when he received them,—if they were open to inspection when shipped, and no fraud or imposition were practised on him. *Barrett & al. v. Rogers*, 7 Mass. Rep. 297. But if the goods were delivered in packages, and not open to inspection, such bill of lading would not

BILL OF PARTICULARS. See *Particulars*.PART
IV.BLACK ACT. See *Hundred, actions against.—Malicious mischief.—Arson.—Murder.*

* BOND.

* 309

THE proof in an action on a bond depends entirely upon the issue taken upon the plea of *non est factum*, payment, performance of conditions, &c. Proof of.

Upon the plea of *non est factum* the plaintiff must prove the execution of the bond in the usual way (*m*).

Where the bond contains a condition for the performance of covenants and agreements, breaches must be assigned under the stat. 8 & 9 Will. c. 11, s. 8, in the declaration, or suggested on the roll, in all cases, except money-bonds and bail-bonds (*n*), and, as it seems, bonds entered into by a petitioning creditor to the Ld. Chancellor in case of bankruptcy. After proof of the bond the plaintiff proceeds to prove the breaches assigned, where, from the nature of the case, the burthen of proof is not thrown on the defendant to prove the affirmative; as, where the condition is to pay money by instalments, or the payment of rent. Breaches.

In an action on an annuity-bond, the plaintiff must prove that the party, during whose life the annuity is granted, is still living. If the bond be conditioned for the performance of covenants in some other deed, the plaintiff must prove the execution of the latter deed, as well as of the bond, and also that the covenant has been broken. Annuity bond.

The plaintiff, in cases where breaches are assigned under the statute, must give evidence of the amount of his damages (*o*).

Upon an engagement to replace stock, the plaintiff may estimate his damages, either according to the price

(*m*) *Infra*, tit. *Deed*.

(*n*) 2 B. & P. 446. Tidd's Prac. 507, 4th edit.

(*o*) See 2 Will. Saund. 187, a. 2 N. R. 362.

be conclusive evidence of the good condition of the goods, but *prima facie* evidence of the highest order. *Ibid*.

In a prize court, a bill of lading consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof. *The Friendship*, 3 Wheat. 14.]

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of stock at the day appointed for replacing it, or on the day of the trial (*p*).

* A bond conditioned for the payment of a smaller sum bears interest from the day of payment, although it be given voluntarily (*q*); and where no day of payment is expressed, interest is payable from the time of execution.

Proof in defence.

For the proofs by the defendant under the plea of *non est factum*, see tit. *Deed*.

Plea of payment,

Proof of the payment of the principal only, will, it is said, support a plea of *solvit post diem* (*r*).

After a lapse of twenty years without demand of payment, or of acknowledgment by the obligor, a presumption arises that the bond has been satisfied (*s*); and such presumption is not rebutted by proof of the obligor's poverty (*t*). But it is otherwise, where the obligor has resided abroad during the whole of the time (*u*). So on the other hand, satisfaction may be presumed from the lapse of a space less than twenty years, if other circumstances render it probable that the bond has been satisfied; as, if there has in the mean time been a settlement of accounts between the parties (*x*) (1).

(*p*) *Downes v. Back*, 1 Starkie's C. 218.

(*q*) *Hellier v. Franklin*, 1 Starkie's C. 291. *Farquhar v. Morris*, 7 T. R. 124. *Aliter*, in case of a single bond. *Hogan v. Page*, 1 B. & P. 337.

(*r*) *Dixon v. Parkes*, 1 Esp. C. 110, dub. *Hellier v. Franklin*, 1 Starkie's C. 291. See tit. *Payment*.

(*s*) *Oswald v. Leigh*, 1 T. R. 270. *Colsell v. Budd*, 1 Camp. 27.

(*t*) *Willaume v. Gorges*, 1 Camp. 217.

(*u*) *Newman v. Newman*, 1 Starkie's C. 101.

(*x*) 1 T. R. 270. *Colsell v. Budd*, 1 Camp. 27.

(1) [In the case of *Executors of Clark v. Hopkins*, 7 Johns. 556, it is said that after *eighteen or twenty* years, a bond will be presumed to have been paid, and that to rebut the presumption, the obligee ought to show a demand of payment and an acknowledgment of the debt, within that time. See also *Shepard's Executors v. Cook's Executors*, 2 Hayw. 238. In *Boltz & al. v. Ballman*, 1 Yeates 584, a lapse of eighteen years and a half was ruled not to be sufficient to found a presumption of payment of a bond, under circumstances that tended to repel the presumption: And in *Goldhawk v. Duane*, Circuit Court, April, 1809, Wharton's Digest, 91, it was held that if the period be shorter than twenty years, the presumption of payment must be supported by circumstances. *S. P. Palmer v. Dubois*, 1 Rep. Con. Ct. 180. *Cottle v. Payne*, 3 Day, 289. Where no interest had been paid for 23 years, proof of a suit having been commenced and abandoned during that period, was held not to weaken the presumption of payment. *Palmer v. Dubois*, *ubi sup.* A confession by one co-obligor that he had never paid,

Indorsements on the bond, although in the handwriting of the obligee, acknowledging the receipt of interest within the space of twenty years, have been admitted for the purpose of rebutting the presumption of satisfaction, arising from the lapse of twenty years, although no evidence was given to prove that the *indorsements existed before the twenty years had elapsed (y); but the admissibility of such evidence appears to be very doubtful in principle, and the contrary has been ruled at Nisi Prius (z). * 311

BREACH OF PROMISE OF MARRIAGE.

See tit. *Marriage*.

(y) *Searle v. Ld. Barrington*, 2 Str. 826. *Glyn v. Bank of England*, 2 Ves. 42. And see Vol. I. p. 310. [and note (1) p. 311.]

(z) *Rose v. Bryant*, 2 Camp. 321.

and that he believed the other had not, is not sufficient, after a lapse of twenty years, to rebut the presumption. *Haskell v. Keen*, 2 Nott & M'Cord, 160. The existence of a civil war, &c. is sufficient to repel the presumption of payment of a bond, though 20 years have elapsed, and no interest has been paid. *Brewton v. Cannon*, 1 Bay, 482. And in Pennsylvania, in an action, tried in 1794, on a bond conditioned for the payment of money in 1769, on which no receipts had been indorsed, it was ruled that the period of time between 1776 and 1784, during which the limitation acts had been suspended, ought to be taken out of the calculation. *Penrose & al. v. King*, 1 Yeates, 344. See also *Conn & al. v. Penn & al.* 1 Peters' Rep. 524. *Jackson v. Pierce*, 10 Johns. 414. *Bailey v. Jackson*, 16 ib. 210. *Dunlop & Co. v. Ball*, 2 Cranch, 180. *Higginson v. Mein*, 4 Cranch, 415. *Quince's Administrators v. Ross's Administrators*, 1 Taylor, 155. S. C. 2 Hayw. 180. *Rearden v. Searcy's Heirs*, 3 Marsh. 544. S. C. 1 Littell's Rep. 53.

Acknowledging a bond and apologizing for not paying it will rebut the presumption of payment arising from not paying interest for 25 years. *Smedes v. Hooghtaling & al.* 3 Caines' Rep. 48. An entry made 19 years before, in the books of the defendant's testator, that a promissory note of 23 years' standing was paid, was allowed to be read to support the presumption of payment. *Rodman v. Hoop's Executor*, 1 Dallas, 85. See also *Cohen v. Thompson*, 2 Rep. Con. Ct. 146. *Levy v. Hampton*, 1 M'Cord, 145.

A statute of Connecticut limits the payment of bonds of a certain description to seventeen years: And neither an indorsement nor payment on such bonds will save them from the operation of the statute. *Gates v. Brattle*, 1 Root, 187. *Fuller v. Hancock*, ibid. 238. Whether the rule of not presuming payment within twenty years applies in that state to bonds not within the statute—*Quare*—*Cottle v. Payne*, ubi sup. In Maryland, a statute limits suits on bonds to twelve years. See *Hammond v. Denton*, 1 Har. & M'Hen. 200.

The presumption, from lapse of time, that a bond has been paid, unless the delay is accounted for, is allowed to prevail in a court of chancery, in the same manner as in a court of law. *Giles v. Baremore*, 5 Johns. Ch. Rep. 545.]

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BRIBERY.

UPON a trial for bribery under the stat. 2 Geo. II. c. 24, although the defendant took the note of the voter to whom the money was paid, and insists that it was a mere loan, it is a question for the jury whether it was not a gift (*a*).

To prove the allegation that *A. B.* was a candidate, where the bribery was previous to the election, it is sufficient to show that a poll was demanded for him, for till then every one is a candidate for whom a poll is asked; and that fact makes the person on whose behalf the bribe was given a candidate (*b*); but after the time of election the poll-books are the proper evidence to prove that a particular person was a candidate (*c*) (1).

Where the declaration alleged that the party was bribed to vote for *L.* and *E.*, and it was proved that he was bribed to vote for *L.* and *his friend*, it was held that the variance was not fatal, since the material fact is that the party was bribed to vote (*d*).

On a declaration for corrupting one Moor, and bribing * 312 him to vote for the defendant, it is no defence * to show that Moor did not vote for the defendant (*e*) (2). The person who took the bribe is a competent witness (*f*).

BRIDGE.

Indictment
against a
county.

On an indictment against a county for not repairing a bridge, the prosecutor must prove, 1st, that it is a public bridge; 2ndly, that it is situate within the county; 3dly, that it is out of repair (3).

(*a*) 1 Bl. R. 317, 318.

(*b*) Ibid. 323.

(*c*) Ibid.

(*d*) Ibid. 3 Burr. 1423. 1586.

(*e*) *Sulston v. Norton*, 1 Bl. R. 317. *Bush v. Ralling*, Sayer, 289. *Phillips v. Fowler*, cited, Sayer, 291.

(*f*) 4 Burr. 2285. 2469. *Edwards v. Evans*, 3 East, 451. *Heward v. Shipley*, 4 East, 180.

(1) [In an information for bribery in an election, it ought to appear certainly that an election was held, and that the vote was given at that election. *Newell v. Commonwealth*, 2 Wash. 88.]

(2) [An offer to bribe is indictable, though the bribe is not accepted. *United States v. Worrall*, 2 Dallas, 384.]

(3) [Every city, county and district in South Carolina is bound to lay off and keep in repair its own roads, bridges and causeways, and to defray the expense thereof. *Shoolbred v. Corporation, &c. 2 Bay*, 63.]

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1st. That it is a public bridge.—The principal evidence to prove this is that of the actual use of the bridge by the public, and that it is of *public convenience* and has been repaired at the public expense. It is not necessary to prove that it is an ancient bridge, or that it was originally built with the concurrence of the public. Where a bridge had been originally erected by a private person forty years ago, but had been since used by the public, it was held that it was a public bridge (g). That it is a public bridge.

About forty-five years ago there was a ford through the river where the bridge was built, which was part of an highway from London to Maidstone. The river was deep at flood-times up to the middle; at ordinary times up to the knee. A miller erected a dam across the river, which raised the water about three inches, and five years afterwards built the bridge in question. In *this case, much * 313 reliance was placed on the *dictum* in Rolle's Ab. 368; viz: "that if a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects use to go over this as a common bridge, the bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit," for which he cites 8 Edw. II, the case of the Prior of Stratford. But on referring to that case, it appeared that the liability there was *ratione tenuræ* (h), and the Court laid down the rule broadly, in conformity with all the authorities, except that in Rolle, that if a private person build a private bridge, which afterwards becomes of *public convenience*, the county is bound to repair it (i). The circumstance that the bridge is of private convenience and utility to the party who built it, makes no difference (k). The test is not, as it seems, any *adoption* of the bridge by the public, but its becoming *useful* to the county in gene-

(g) *R. v. Inhab. of Kent*, 2 M. & S. 513. 1 Roll. Ab. 368. *R. v. Inhab. of Wilts*, 6 Mod. 307. 1 Salk. 359. Case of *Glusburne Bridge*, 5 Burr. 2594. 2 Bl. R. 386, n. 685. *R. v. Inh. of the W. R. of York*, 2 East, 353. *R. v. Inhab. of Glamorgan*, 2 East, 356. *Ld. Portman's case*, cited 13 East, 225. Case of the *Medway Canal*, 13 East, 220.

(h) See a copy of the curious record in this case, 2 M. & S. 520.

(i) *R. v. Inhab. of Kent*, 2 M. & S. 513. And see *R. v. Inhab. of Wilts*, 1 Salk. 359. And see the rule laid down by Aston, J. in the *Glusburne Bridge* case, 5 Burr. 2594. *R. v. Inhab. of Lancashire*, cited by Lawrence, J. 2 East, 352.

(k) *R. v. Inhab. of Glamorganshire*, 2 East, 356, in note.

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Public bridge.

ral (*l*) ; if the bridge be of public utility, the county who derive advantage from it must support it (1).

A bridge may be a public carriage-bridge, although used but occasionally by carriages, except in the times of flood and frosts, when it is dangerous to pass the river (*m*).

- * 314 Where the Medway Navigation Company, under an act, which enabled them to amend or alter such bridges * or highways as might injure the passage or navigation, leaving them, or others as convenient, in their room, forty years ago destroyed a ford across the river in a public highway, by deepening its bed, and built a bridge over the same place, it was held that they were bound to keep it in repair under the conditions of the act (*o*). So, where a canal-company cut and deepened a ford across a highway, and thereby rendered a bridge necessary for the use of the public, which they built, it was held that they were bound to repair it, the bridge being necessary for the purposes of the company, and not for the purposes of the public (*p*).

Where a parish wooden bridge, used occasionally by light carriages, had been replaced by a spacious stone bridge, built by the trustees of a road, it was held that the county was bound to repair it, and that the inhabitants of the county could not plead that it had been repaired immemorially by the parish (*q*).

By the stat. 43 Geo. III. c. 59, s. 5, no bridge shall be deemed or taken to be a county-bridge, or a bridge which the inhabitants of any county shall be compelled or liable to maintain or repair, unless such bridge shall be erected in a substantial or commodious manner, under the direction or to the satisfaction of the county surveyor, or person ap-

(*l*) Per *Ld. Ellenborough*, *R. v. W. R. of Yorkshire*, 2 East, 349 ; and per *Aston, J.* in the *Glusburne Bridge* case, 5 Burr. 2594 ; and *Ld. Coke's Comment on the Stat. of Bridges*, 2 Inst. 700.

(*m*) *R. v. Inhab. of Co. of Northampton*, 2 M. & S. 262.

(*o*) *R. v. Inhab. of the Co. of Kent*, 13 East, 219. [See *Inhab. of Waterbury v. Clark*, 4 Day, 198.]

(*p*) *R. v. Inhab. of the parts of Lindsey, in the Co. of Lincoln*, 14 East, 317. See also *R. v. Inhab. of Somerset*, 16 East, 305.

(*q*) *R. v. Inhab. of Surrey*, 2 Camp. 455. *R. v. Inhab. of Cumberland*, 6 T. R. 194. *S. C.* in error, 3 B. & P. 354. Where townships have so enlarged a bridge which they were before liable to repair as a foot-bridge, they are still liable *pro rata*. *R. v. W. R. of Yorkshire*, 2 East, 253.

(1) [In the case of *The State v. The Town of Campton*, 2 N. Hamp. Rep. 513, it was decided that a bridge, although erected by individuals, yet if dedicated to the public and used freely by them so long as to evince its public usefulness, must be repaired by them.]

pointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster at their general annual sessions.

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The inhabitants of a county are also bound to repair * to the extent of 300 feet of the highway at each end of the bridge (r). Public bridge.
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The inhabitants of a county, upon the plea not guilty, cannot throw the *onus* of repairing the bridge upon any other parties; to do this, a special plea is necessary, setting forth the obligation of such other parties specially (s). Under the general plea, the defendants cannot adduce evidence, except in denial of one or more of the points which must be established on the part of the prosecution; viz. 1st. That the bridge is a public one; 2ndly, situate within the county; and 3rdly, out of repair. Proof in defence.

But a county, on the plea of not guilty, may prove the repair of the bridge by individuals (t), as a medium of proof that the bridge is not a public bridge. As, that the feoffees of certain estates had repaired it (u); for repairs done by an individual are *prima facie* to be ascribed rather to motives of private interest in his own property, than presumed to have been done for the public benefit (x). But it seems that such evidence is of little weight (y) when placed in competition with evidence of *user* by the public. Evidence that a bar across a public bridge is kept locked except in times of flood, is conclusive to show that the public have no more than a limited right to use it on those occasions; and in such a case, if the indictment should aver that the bridge was a public bridge, used by the King's subjects at * their free will and pleasure, the variance would * 316 be fatal (z).

Where an indictment alleged that a bridge was a public carriage-bridge, and also for the King's subjects passing Proof in defence by a county.

(r) *R. v. Inhab. of W. R. of Yorkshire*, 7 East, 588; and in Dom. Proc. 5 Taunt. 284.

(s) See the stat. 22 Hen. VIII. c. 5. *R. v. Inhab. of W. R. of Yorkshire*, 7 East's R. 558. 5 Taunt. 284. *R. v. Inhab. of Bucks*, 12 East, 192.

(t) 2 M. & S. 262, *R. v. Inhab. of Co. of Northampton*.

(u) Ibid.

(x) Per Ld. Ellenborough, 2 M. & S. 264.

(y) Ibid.

(z) *R. v. The Marquis of Buckingham*, 4 Camp. 189—Where a bridge is in a highway, the forbearing to prosecute it as a nuisance is evidence of acquiescence by the county. Per Bayley, J. *Rex v. Inhab. of St. Benedict*, 4 B. & A. 450. See *Rex v. W. R. of Yorkshire*, 2 East, 342.

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and repassing on foot; and upon the evidence it appeared that it had been used by passengers on horseback and on foot, and not with carriages, it was held that the defendants could not be convicted of any part of the charge (a).

Special plea. Upon a special plea by a county that some smaller district, or some individual, is liable to the repairs of the bridge, the evidence seems to be the same as upon an indictment against the smaller district or individual.

Against individuals, &c. Upon an indictment against a less district than a county, or against an individual, the prosecutor must also prove the liability of the defendants to repair, either from prescription generally, or *ratione tenuræ* (b), as alleged in the indictment.

Prescription. A plea by the inhabitants of a county, that certain townships had *immemorially* used to repair a bridge, is disproved by evidence that the townships had enlarged the bridge to a carriage-bridge, which they had before been bound to repair as a foot-bridge (c). Where, upon a similar plea, it appeared that a parish was bound by prescription to repair a wooden foot-bridge, used by carriages only in time of flood, and that forty years ago the trustees of a turnpike road had built upon the same site a wider bridge of brick, which
 * 317 * had since been constantly used by all carriages passing that way, it was held that the plea was not sustained by the evidence (d).

Ratione tenuræ. Upon an indictment against a county, the defendants pleaded that J. S. was liable *ratione tenuræ*. It appeared that J. S. had purchased part of an estate, the owner of which, both before and after the purchase, had repaired the bridge, and it was held that this was not sufficient evidence to support the plea (e). But where an entire estate or manor is liable to the repair of a bridge, and the estate

(a) Per Bayley, *J. R. v. Inhab. of Lancashire*, Lancaster Summer Assizes, 1820.

(b) See tit. *Prescription and Highways*.

(c) *R. v. Inhab. of W. R. of Yorkshire*, 2 East, 353. See also *R. v. Inhab. of the Co. of Surrey*, 2 Camp. 455.

(d) *R. v. The Inhab. of the Co. of Surrey*, 2 Camp. 455.

(e) *R. v. The Inhab. of Oxfordshire*, 16 East, 223. There was no evidence to show in respect of what lands the former owner of the whole (Ld. Cadogan) repaired the bridge; and as he still retained part of the estate, and continued to repair the bridge, there was no evidence to charge J. S., except that Ld. Cadogan had sold him some lands, which the Court held to be insufficient to charge him with the obligation to repair.

or manor is afterwards divided amongst several, they are each severally liable to the whole charge (*f*).

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Where the indictment charged a corporation with a prescriptive obligation to repair a bridge, and a charter of incorporation granted by Edw. VI. was given in evidence, from the terms of which it appeared to be doubtful whether the corporation had before existed immemorially, and whether lands had not been given for the repair of the bridge (*g*), but parol evidence was given that the corporation had in fact repaired the bridge as far back as living memory could go, it was held that the parol evidence and the charter * might be taken in aid of each other, and that the preponderance of evidence was, that this was a corporation by prescription, although words of incorporation were used in the incorporating part of the charter only; and that the corporation were still bound to repair by prescription, and not by tenure (*h*).

Corporation.

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An individual, or the inhabitants of any district inferior to a county, may give any matter in evidence in their own discharge under the general issue (*i*). (1)

Defence.

By the stat. 1 Ann. c. 18, s. 13, upon the trials of indictments and informations against individuals for the non-repair of bridges, the inhabitants of the town, corporation, county, &c. where the bridge is, are competent witnesses. Previous to this statute such witnesses were in some instances held to be competent on the ground of necessity (*k*).

Competency.

BURGLARY (*l*).

On an indictment for burglary it is essential to prove, Breaking.

(*f*) *R. v. Duchess of Buccleugh*, 1 Salk. 358. 3 Salk. 77. 6 Mod. 150. 1 Holt, 128. 7 Mod. 55. 98.

(*g*) *R. v. The Mayor, &c. of Stratford-upon-Avon*, 14 East, 348. The terms of the charter itself are too long to be introduced here, and the case is cited merely for the purpose of showing how far parol evidence of the cause may be given as explanatory of the doubtful terms of a charter.

(*h*) 14 East, 348.

(*i*) See tit *Highway and Prescription*.

(*k*) See 2 Show. 47. 2 East, 561. Inhabitants were held to be competent as to the fact of non-repair, on the ground of neutrality. Gil. L. E. 129. 2d. Ed. *Rex v. Carpenter*, 2 Show. 48.

(*l*) See the form of the indictment, and the necessary averments, Stark. Crim. Pleadings.

(1) [The inhabitants of a town where a bridge has recently been built without any authority are not obliged to repair it. *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. 180.]

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Proof of break-
ing.

1st, a felonious breaking and entering ; 2ndly, of the dwelling-house ; 3rdly, in the night time ; 4thly, with intent to commit a felony.

* 319 In the first place, it is a question of fact for the jury whether the prisoner has been guilty of any act of breaking ; but whether that act amounts to a burglarious breaking, is a pure question of law. There must be evidence of an actual or constructive *breaking*, for if the entry was obtained through an open door or window, it is no burglary (*m*). But the * lifting of a latch (*n*) ; (1) taking out a pane of glass ; lifting up of folding doors (*o*) ; breaking of a wall or gates which protect the house (*p*) ; the descent down a chimney (*q*) ; the turning of a key where the door is locked on the inside (*r*), constitute a sufficient breaking.

Where the glass of the window was broken, but the shutter within was not broken, it was doubted whether the breaking was sufficient, and no judgment was given (*s*).

Where an entry has been gained without any breaking, a subsequent breaking will constitute the offence ; as, where the party lifts the latch of a chamber door (*t*), (1) or a servant raises the latch of his master's door with intent to murder or rob his master (*u*).

It has been doubted, whether a guest at an inn can be guilty of burglary, in respect of breaking his own chamber-door, since he has a special property in the chamber (*x*).

(*m*) Fost. 107. 1 And. 114. Savile, 59. 1 Hale's P. C. 551. 553. 556. Summ. 81. 3 Inst. 64. 1 Haw. c. 38. [Mirror ch.-1. § 11.] The breaking, which is sufficient in an action of *clausum fregit*, will not always be sufficient to constitute a burglary. 1 Haw. c. 38. 1 Hale, 508. 527. 551.

(*n*) East's P. C. 487.

(*o*) *Brown's case*, East's P. C. 487. In this case the doors, which were horizontal, were closed by their own natural weight, without any interior fastening ; but in *Callam's case*, (Russell, 903), Cor. Ld. Ellenborough, U. B. 1809,) which was similar, except that the trap-door had an internal bolt, which was not in, it seems that the Judges were of opinion that the lifting up of the door was not a sufficient breaking.

(*p*) 1 Hale's P. C. 559.

(*q*) East's P. C. 485. Crompt. 32. Dalt. 253.

(*r*) Ibid. 487. 1 Hale, 552.

(*s*) *Chambers's case*, East's P. C. 487.

(*t*) *R. v. Johnson*, East's P. C. 488. 1 Hale's P. C. 553.

(*u*) Kel. 67. Pop. 84. Hutt. 20. *R. v. Binglose*, East's P. C. 488. *R. v. Gray*, Str. 481. Dy. 99.

• (*x*) Haw. c. 38. But if the chamber of the guest be broken by

(1) [*The State v. Wilson*, 1 Coxe's Rep. 439. acc.]

Most of these observations apply also * to an indictment for *breaking out*, under the stat. 12 Ann. c. 7, s. 3, which is a declaratory act.

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Some part of the *house* must be broken ; it is not sufficient to show that a box was broken (*y*) ; and it seems, that in favour of life, cupboards, presses lockers, and other fixtures, which merely supply the place of chests, and other ordinary utensils of household, are to be considered as mere moveables, although in questions between the heir or devisee and the executor, they may with propriety be considered as parts of the freehold (*z*).

Proof of breaking.

A constructive *breaking* may be proved, as where entrance was gained by means of fraud, stratagem, or threats, with a felonious design, for the law regards such means in as heinous a point of view as actual violence (*a*). Hence, the gaining admission by raising a hue and cry, and bringing a constable, to whom the owner opens the door (*b*), under pretence or business (*c*) ; under pretence of taking lodgings (*d*) ; under a judgment against the casual ejector obtained by false affidavits, and without any colour of title (*e*) ; by fraudulently persuading an inmate to give admission (*f*) ; by conspiracy with a servant (*g*) ; or, lastly, * by threats of violence to the owner who opens the door of his house (*h*), is sufficient to constitute the offence.

Breaking, constructive.

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another, the dwelling-house must be alleged to be the innkeeper's, and a guest may be guilty of larceny in respect of goods intrusted to him as a guest.

(*y*) Foster, 108. [*The State v. Wilson*, 1 Coxe's Rep. 439.]

(*z*) Fost. 109, in *Gibbon's* case.

(*a*) 1 Haw. c. 38. 1 Hale's P. C. 508. 527. 551.

(*b*) East's P. C. 485. 1 Haw. c. 38, s. 5. 3 Inst. 64. Summ. 81.

(*c*) *Le Mott's* case, Kel. 40. 1 Haw. c. 38, s. 8.

(*d*) *R. v. Cassey & Cotter*, Kel. 63. And see *Semple's* case, 1 Leach, 484.

(*e*) *R. v. Farre*, Kel. 43.

(*f*) *R. v. Ann Hawkins*, East's P. C. 485, MS. Tracy, 80, & MS, Sum. The prisoner, in the absence of the family, persuaded the boy, who kept the key of the house, to let her in, by a promise of a pot of ale, and after admission, and whilst the boy was gone for the ale, she robbed the house. See *R. v. Le Mott*, Kel. 42. East's P. C. 486. 494.

(*g*) Where a servant lets another in to commit a burglary, it is burglary in both. *Cornwall's* case, East's P. C. 486. 2 Str. 881. 4 Bl. Comm. 227. 10 St. Tr. 433. 1 Hale, 553.

(*h*) East's P. C. 486. 2 M. S. Sum. 298. 1 Hale, 553. 1 Haw. c. 38, s. 4. East's P. C. 491. Where, however, the servant, by the assent of the master, lets in robbers, under an agreement with them to rob the house, it seems to be doubtful whether the act be burglarious. See East's P. C. 486 ; and *Eggington's* case, *Ibid.* 494.

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Entry.

Some entry must be proved. If thieves by threats of violence induce the owner of a house to throw out his money to them in the night time, which they take up in the owner's presence, the offence would be a robbery, but not a burglary (*i*). But any the least entry is sufficient, by means of the hand (*k*) or foot, or even by an instrument, such as a pistol or hook (*l*). So, it seems, that the discharging a loaded gun through the window of a dwelling-house is a sufficient entry (*m*).

But the entry must appear to have been made with the immediate intent to *commit a felony*, as distinguished from the previous intent to *procure admission* to the dwelling-house. Where it appeared that a centrebit had penetrated through the door, chips being found in the inside of the house, yet, as the instrument had been introduced for the purpose of breaking, and not for the purpose of taking the property, or committing any other felony, it was held that the entry was incomplete (*n*).

* 322. * If *A.* send in a child of seven or eight years old at the window, who takes goods out and delivers them to *A.*, who carries them away, it is a burglary by *A.*, though the child, for want of discretion, be not guilty (*o*).

It is not essential to prove that the entry was on the same night with the breaking (*p*), provided both were in the night.

Dwelling-house, what is.

Secondly, of the *dwelling-house* of another (*q*). (1) It is to be considered, 1st, what constitutes a dwelling-house; 2ndly, its extent; 3rdly, proof of ownership.

(*i*) 1 Hale, 505. East's P. C. 486. 1 Haw. c. 38, s. 3. Sav. 59. Crompt. 31, *contra*. Dalt. c. 151, s. 3.

(*k*) *R. v. Gibbons*, Fost. 107. East's P. C. 490; where the prisoner cut a hole in the shutters of a dwelling-house, through which he put his hand and took out watches.

(*l*) 3 Inst. 64. East's P. C. 490.

(*m*) See East's P. C. 490. 1 Haw. c. 38, s. 7. 1 And. 115. *Ld. Hale* (1 P. C. 555,) says that it does not make a burglary, but adds a *quære*.

(*n*) *R. v. Hughes & others*, 1 Leach, 452. East's P. C. 491.

(*o*) 1 Hale, 555, 6.

(*p*) *Ibid.* 551, 557. East's P. C. 491. An entry sufficient to constitute a burglary is also sufficient under the statutes against housebreaking in day-time, under the stat. 1 Edw. VI. c. 12, s. 6. 39 Eliz. c. 15. Fost. 108.

(*q*) A mansion, the breaking which may constitute a burglary, includes the walls or gates of a town and churches.

(1) [In an indictment for burglary, the words "mansion house" sufficiently describe a dwelling-house. *Commonwealth v. Pennock*, 3 Serg. & Rawle, 199.]

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1st. A dwelling-house is constituted by a *permanent inhabitancy* of the house. Mere inclosed ground, or a booth, or tent, is not a dwelling-house (*r*); but a hayloft above a stable is, if inhabited, although it be rated as appurtenant to the stable (*s*). Chambers in the inns of court, and in colleges within the universities, are dwelling-houses (*t*).

Inhabitancy.

An actual inhabitancy previous to the offence is essential, and therefore, although goods have been brought into a house, and possession taken with a view to inhabitancy, yet no burglary can be committed by breaking into the house previous to actual residence by the owner or some of his family (*u*). Nor where the *inhabitancy is casual, and for a particular purpose, as, where a workman sleeps in an unfinished house (*x*), or an agent is placed in the house to watch thieves, or goods (*y*).

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But where there has been an actual inhabitancy, by the owner or his servants sleeping in the house, a burglary may be committed in the absence of the owner and all his family, provided the house has not been abandoned, and there be an *intention to return* to the house (*z*). But in all such

Animus
revertendi.

(*r*) Haw. c. 39, s. 17.

(*s*) *Turner's case*, East's P. C. 492.

(*t*) Hale, 556. Haw. c. 38, s. 1.

(*u*) *R. v. Lyon & Miller*, Leach, 221. East's P. C. 497. Haw. c. 38, s. 11. *Hallard's case*, East's P. C. 498; where the former tenant had quitted the house, and the in-coming tenant had put all his goods into the house, and had frequently been there in the day-time, but neither he nor any part of his family had ever slept there; it was held by Buller, J. that no burglary could be committed there. The same point was decided by Grose, J. in another case. See East's P. C. 498.

(*x*) Where an executor puts servants into the house which belonged to him as executor, it seems that burglary may be committed there. *R. v. Jones & Longman*, East's P. C. 499.

(*y*) *Brown's case*, East's P. C. 501. *Smith's case*, East's P. C. 497. 1 Hale, 557. *Harris's case*, Leach, 808. East's P. C. 498. *R. v. Davis*, East's P. C. 499.

(*z*) 1 Hale, 550. 1 Haw. c. 38. East's P. C. 496. Summ. 82. *R. v. Murry & Harris*, East's P. C. 496. Fost. 77. J. Nicholls, the owner of the house at Westminster, took a journey into Cornwall, with intent to return, and sent his wife and family out of town, and left the key with a friend to look after the house; after he had been gone a month, the house was broken and robbed in the night-time; in a month afterwards he returned with his family and inhabited the house; and adjudged to be burglary, O. B. 10 Will. III. In the case of *R. v. Kirkham & Ellison*, (Lanc. Sp. Ass. 1817), Wood, B. held that the offence of stealing in a dwelling-house, under the stat. 12 Ann. had been committed, although the owner and his family had left the house six months before, having left the furniture, and intending to return.

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cases the inquiry as to the intention to return is material, and should be distinctly proved.

* 324 Where the owner of the house, at the latter end of the summer quitted the house, which he had generally used for a summer-residence, and took away great part of the furniture, and had not then come to any settled resolution whether he would return or not, but said * that he was rather inclined totally to quit the house and let it for the remainder of the term, and the house was broken and robbed in the January following, the Court held, that under the circumstances the house could not be considered as his dwelling-house (a).

Extent.

2dly. *Extent of the dwelling-house*.—The term dwelling-house comprehends all buildings within the curtilage or inclosure (b), all under the same range of building and roof, such as the buttery of a college (c); and it is sufficient if the building adjoin the dwelling-house, and it appear to the Jury that it is occupied as parcel of the dwelling-house, although there be no common curtilage and enclosure, or internal communication (d), such as a barn, stable, cow-house, dairy-house or the like, or a back-house eight or nine yards distant from the dwelling-house, and connected only by a pale extending between them (e), but no distant barn or warehouse can be considered as part of the dwelling-house; nor can an out-house, however near, be so considered, unless it be within the same curtilage, or be occupied as parcel of the dwelling-house (f). (1). Where the

(a) *Nutbrown's case*, Fost. 176. East's P. C. 496.

(b) 1 Hale, 358. 559. Haw. c. 38, s. 12. East's P. C. 492.

(c) *R. v. Maynard*, East's P. C. 501.

(d) *Brown's case*, East's P. C. 493. The prosecutor had a dwelling-house in which he lived, and a stable, cottage, cow-house and barn, all in one range of building in the order mentioned, and under one roof, but not enclosed within any wall or court-yard, and without any internal communication from the one to the other; the prisoner stole corn from the barn at night; and after conviction, the Judges held that the conviction was proper. *Gibson's case*, East's P. C. 508.

(e) So held by all the Judges, in 1665. See 1 Hale, 558, 559, 1 Haw. c. 38, s. 12. 3 Inst. 64, 65. 4 Bl. Comm. 225. Dalt. c. 151. s. 4. East's P. C. 492.

(f) East's P. C. 493.

(1) [The breaking open, in the night-time, of a store, at the distance of twenty feet from a dwelling-house, but not connected with it by any fence or enclosure, and no person sleeping in the store, is not burglary. *The People v. Parker*, 4 Johns. 424.

In

out-house is separated from the dwelling-house, but occupied with it, the Jury ought to find whether it is parcel of the dwelling-house or not.

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* In *Garland's* case (*g*), the Jury found specially that the prisoner in the night-time broke into an out-house in the possession of *G. S.*, and occupied by him with his dwelling-house, and separated therefrom by an open passage eight feet wide, and that the said out-house was not connected with the said dwelling-house by any fence enclosing both. And the Judges were of opinion that there should be judgment for the prisoner, for the Jury should have found it parcel of the dwelling-house if it were so (*h*). * 325

Extent of
dwelling-
house.

In *Eggington's* case (*i*) it appeared that a manufactory was carried on in the centre of a large pile of building, in the wings of which several persons lived, but they had no internal communication; that the roofs were connected, and the entrances to all were from the same common enclosure. And all the Judges held that the centre building could not be considered as parcel of any of the dwelling-houses, and could not be considered as under the same roof, although the roofs were connected.

The *ownership* and situation of the dwelling-house must be proved as it is laid in the indictment, and in the proper county. Since the consideration of ownership is sometimes rendered complicated by the circumstances * of the * 326

(*g*) East's P. C. 493, Som. Lent Ass. 1776. .

(*h*) *Ld. Hale* seems to intimate, that if the prosecutor were to hold the out-house as tenant to one and the dwelling-house as tenant to another, burglary could not be committed in the out-house, however proximate to the dwelling-house its situation might be (1 *Hale*, 559); but this doctrine is justly questioned by *Mr. East*, in his P. C. 493. It is difficult to conceive how the title under which the legal occupant of an out-house holds it can affect the question whether it be or be not a parcel of the dwelling-house. It is very possible that a man may hold different parts of the same entire dwelling-house under different owners; and the principle, if well founded, would equally apply to such a case.

(*i*) Staff. Sp. Ass. 1801. East's P. C. 494.

In North Carolina, burglary may be committed in a house standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be open or enclosed. *The State v. Twitty*, 1 Hayw. 102. *The State v. Wilson*, *ibid.* 242.

In South Carolina, to break and enter by night into a store-house in which no one sleeps, which has no internal communication with the dwelling-house, and is not connected with it, except by a fence, is not burglary. *The State v. Ginns*, 1 Nott & McCord, 583.]

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Ownership.

Where a house is let to several lodgers or inmates, and the owner inhabits elsewhere, each separate apartment is the dwelling-house of the lodger by reason of his separate inhabitancy. So burglary may be committed by breaking into chambers in the inns of court, or in colleges, and each must be laid to be the dwelling-house of him who inhabits it *suo jure* (x).

- * 329 * 3rdly. Where several are in joint occupation of the dwelling-house *suo jure*, the dwelling-house is that of all, and must be so laid.

Where the buttery of a college is burglariously broken it must be laid to be the dwelling-house of the master, fellows, and scholars (y).

In the night.

Thirdly. In the night-time.—That is, where there is not *day-light* sufficient for discerning the face of a man (z). The light of the moon is immaterial (a). Both the breaking and entering must, it is said, be in the night (b), but it is not essential that both should be done on the same night.

Intent.

Fourthly, with a felonious intent.—This may be to commit a felony at common law, as a murder, larceny or rape (c), or a felony by statute; for such a felony possesses all the incidents of a felony at common law (d).

Evidence that larceny was committed is *prima facie* evidence of an entry with a felonious intent (e). The felony, or the intent, must be proved as laid.

- If an intent to steal be alleged, it is not sufficient to prove an intent to rescue goods seized by an excise officer (f). If the intent be alleged to kill, it is insufficient to prove an intent to maim (g). If an intent be laid to steal the goods of A., it is not sufficient to * prove an intention to steal the goods of B. (h). If an actual larceny be al-

(x) *Trapshaw's case*, Leach, 478. *East's P. C.* 506.

(y) *R. v. Maynard*, *East's P. C.* 501.

(z) Haw. c. 38. 3 Inst. 63. Sav. 47. 1 Hale, 550. 9 Co. 66. Cro. Eliz. 583. Formerly it was held to be burglary if committed between sun-set and sun-rise. *East's P. C.* 509. Haw. c. 38.

(a) *East's P. C.* 509.

(b) Crompt. 33. 8 Ed. II. Qu. *East's P. C.* 509.

(c) *East's P. C.* 509. 1 Hale, 559. 561. Kel. 67. 1 Show. 53. As to a rape, see *R. v. Locost & Villers*, Kel. 30. 1 Hale, 560. 562. *Gray's case*, Str. 481.

(d) *R. v. Dobbs*, *East's P. C.* 513. 1 Hale, 561.

(e) Kel. 30. 1 Hale, 560.

(f) *R. v. Knight & Roffey*, *East's P. C.* 510.

(g) *East's P. C.* 513.

(h) *R. v. Jenks*, Leach, 896. *East's P. C.* 514.

leged, it is not sufficient to prove a mere intention to steal (i).

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IV.

If a servant in conspiracy with another let him into the house, it is burglary in both (k). Where several are concerned, the entry of one is the entry of all; and although some stand on the outside to keep watch, all are equally guilty of burglary (l).

Principal and
accessory.

If a burglar in one county convey the goods into another county, where he is convicted of larceny, he may be ousted of his clergy by proof of the burglary in the former county (m).

Evidence in
case of larceny.

CARRIERS.

In an action against carriers for negligence or other improper conduct, in respect of the carriage of goods, whether the declaration be founded in *assumpsit* for breach of the defendant's undertaking, or in *tort* for breach of duty, it is necessary to prove, 1st, a *contract* express or implied; 2ndly, the *delivery* of the goods; and 3rdly, the defendant's *breach* of promise or duty.

Facts to be
proved.

1st. The action is founded either upon an express and special contract, or an implied one. Where an express contract exists, it must be relied upon and proved; for where there is an express contract, none * can be implied (a). The plaintiff usually relies upon an implied contract, proving that the defendant is a common carrier, as alleged in the declaration, and that the goods in question were delivered to one acting as his agent at the office, warehouse, or other place of business, or to an agent conducting his coach or waggon in its usual course (1).

Proof of con-
tract.

* 331

(i) *R. v. Vandercomb & Abbott*, East's P. C. 514.

(k) *Cornwall's case*, East's P. C. 486. Str. 881. 1 Hale, 555, 1 Haw. c. 38. 10 St. Tr. 433. It has been said that the servant in such case is guilty of larceny only (Dalt. c. 151); but since they both act in the commission of the same crime, it seems that it must be burglary in both or neither, and the breaking and entry by one is the act of both.

(l) 1 Hale, 439. 555. 1 Haw. c. 38. Kel. 111. 161. Fost. 350, 353.

(m) See tit. *Certificate*.

(a) See tit. *Assumpsit*. [*Whiting v. Sullivan*, 7 Mass. Rep. 107.]

(1) [Where *A.* agreed with *B.* a common carrier, for the carriage of goods, and *B.* without *A.*'s directions agreed for the carriage with *C.*, who without *A.*'s knowledge agreed with *D.* a third carrier; it was held that *A.* might maintain an action against *D.* for not delivering the goods, and that by bringing the action he affirmed

PART
IV.Express
contract.

Where the defendant is not a common carrier, it is necessary to prove what the terms of the defendant's undertaking were. If, although he was not a carrier, he expressly undertook to carry the goods safely and securely, he will be liable for any damage which they sustain (b) (1).

If any receipt was given on the delivery of the goods, it should be produced; and if an entry was made in the defendant's book, notice should be given to produce it, and also the way-bill, if the goods were sent by a coach. It should also be proved what orders were given at the time, as to the carriage of the goods, and place of destination, and what was the written direction upon them.

* 332 Where there is no privity of contract except that which arises from ownership, it should appear from the evidence that the plaintiff was the owner of the goods, for if the vendor of goods deliver them to the carrier by order of the vendee, at whose risk they are sent, the vendor is the mere agent of the vendee, and the action should be brought by the latter (c); and if the action * were brought by the vendor he would be nonsuited. Where goods were shipped and described in the bill of lading to have been shipped by order, and on account of the consignee, it was held that no property could be recognized but that specified in the bill of lading, and as that showed the property to be in the consignee, the consignor, who brought the action was non-

(b) *Robinson v. Dunmore*, 2 B. & P. 416.

(c). *Dawes v. Peck*, 8 T. R. 330. *Dutton v. Solomonson*, 3 B. & P. 582. *Jacobs v. Nelson*, 3 Taunt. 423. *Davis v. James*, 5 Burr. 2680. *Moore v. Wilson*, 1 T. R. 659. Although the carrier is to be paid by the vendor, *King v. Meredith*, 2 Camp. 639. And see tit. *Goods sold and delivered*.

the contract made with D. by C. and could not afterwards recover from B. *Sanderson v. Lamberton*, 6 Binney, 129.]

(1) [In North-Carolina, to render a man liable as a *common carrier*, he must make the carriage of goods his *constant* employment,—that by which he obtains his livelihood: One employed *pro hac vice*, though for a reward, is not liable as a common carrier. *Anon. v. Jackson*, 1 Hayw. 14. In South-Carolina, whoever carries goods for hire makes himself a common carrier under the custom, and is chargeable with all faults arising from want of skill, care, or diligence. *M'Clures v. Hammond*, 1 Bay, 99. The practice of conveying for hire, in a stage-coach, parcels not belonging to passengers, constitutes the proprietors of the coach common carriers. *Dwight & al. v. Brewster & al.* 1 Pick, 50. One who receives and forwards goods, taking upon himself all the expenses of transportation, for which he receives a compensation from the owner of the goods, but who has no concern in the vessels by which they are forwarded, or interest in the freight, is not a common carrier, *Roberts v. Turner*, 12 Johns. 232.]

sued (*d*). Where, on the other hand, the bill of lading stated that the goods were shipped by the plaintiffs (in England), to be delivered to *L. D.* in Surinam, and freight was to be paid in London, and the plaintiffs were in fact the agents of *L. D.* who resided abroad, it was held that a sufficient privity of contract had been established (*e*).

An action for negligence of this nature, must be brought against the principal, and not against an agent employed in the conduct of the master's business, although the loss has resulted from the negligence of the latter.

Where it appeared, in an action against the defendant as a common carrier, that he was the mere driver of the coach and not the owner, and that he had before carried parcels for the plaintiff, and it did not appear that in this or any other instance any contract had been made for any reward to be paid for conveyance, it was held that the action should have been brought against the principal. The loss in this case resulted from the negligence of the master through the medium of the servant (*f*). It would have been otherwise if the servant had undertaken to carry for hire on his own account, although in fraud of his master (*g*). So where a parcel * carried from Bristol to Bath, was delivered by the mail-guard to a porter, who received a proportion of the portage, the rest being paid to the proprietors of the inn where the coach stopped for booking, it was held that the porter being a mere servant was not liable for the loss (*h*).

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Where two are jointly interested in a waggon, each is liable for the negligence of an agent in conducting it, although by a subordinate arrangement between themselves each undertakes the conduct and management of the waggon by his own driver and his own horses, for specified distances (*i*). Parties.

Where the declaration is in *assumpsit*, the plaintiff must, as in other cases, prove a joint promise, as by proof that *all*

(*d*) *Brown v. Hodgson*, 2 Camp. 36. [See *Moore v. Sheredine*, 2 Har. & McHen. 453.]

(*e*) *Joseph v. Knox*, 3 Camp. 320.

(*f*) Per Ld. Ellenborough, *Williams v. Cranston*, 2 Starkie's C. 82. [*Dwight & al. v. Brewster & al.* 1 Pick. 54.]

(*g*) *Ibid.*

(*h*) *Cavenagh v. Such*, 1 Price, 328. The coach proprietors in this case had protected themselves by a notice.

(*i*) *Waland v. Elkins*, 1 Starkie's C. 272. 'As to their liability for goods supplied in such a case, see *Barton v. Hanson*, 2 Taunt. 49. [2 Camp. 97. S. C.]

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the defendants were proprietors, or otherwise ; and it is no ground of nonsuit that there are other partners or proprietors who have not been made defendants.

Where the action is laid in *tort*, there has been some difference of opinion, whether, inasmuch as the action is virtually founded upon a contract either express or implied, a verdict may be given against one defendant, and in favour of another (*k*).

* 334 In a late case where the action was against eleven, as coach-owners, for negligence, in consequence of which the coach was overturned and the plaintiff * injured, and there were two counts, both of which specified a contract to carry the plaintiff ; and upon the trial the plaintiff proved the partnership of all but two, and had a verdict against them, the Court of King's Bench afterwards refused a motion for a new trial, or a nonsuit, observing, that the application was contrary to the justice of the case, and that as the objection was on the record the defendants might take it by means of a writ of error (*l*).

Variance.

Where the declaration (in *assumpsit*) alleged that the defendant undertook to carry goods in consideration of certain hire and reward to be paid by the plaintiff, the consignor, and it appeared in evidence that the consignee of the goods had agreed with the plaintiffs to pay for the carriage, it was held to be no variance ; for as between the carrier and the plaintiff the latter was liable (*m*).

Where the plaintiff declares in *assumpsit* in the common form, proof of notice to him of special terms of contract contained in a notice by the defendant, by which he has limited his responsibility, does not occasion a variance (*n*).

A mis-description of the *termini* in the contract of carriage is fatal (*o*).

Proof of delivery.

2ndly. Delivery.—It is sufficient to prove a delivery either to an agent of the defendant's at the usual place of receipt, or to an agent who has authority to receive them, driving the coach or waggon on the course of conveyance (*p*).

(*k*) On the one hand, see *Roson v. Sandford*, 2 Salk. 440. 3 Lev. 258. Carth. 58. 3 Mod. 321. *Potwell v. Layton*, 2 N. R. 365. *Max v. Roberts*, 2 N. R. 454. 12 East, 89. *Buddle v. Wilson* 6 T. R. 369. On the other, *Govett v. Radnidge*, 3 East, 62. *Dickon v. Clifton*, 2 Wils. 319. *Coggs v. Barnard*, 2 Ld. Raym. 909. *Weall v. King*, 12 East, 452, [and Mr. Day's note to that case.] See tit. *Variance*.

(*l*) *Wood v. Brotherton*, Cor. Park, J. Lancaster Sum. Ass. 1820.

(*m*) *Moore v. Wilson*, 1 T. R. 659.

(*n*) *Clarke v. Gray*, 6 East, 564.

(*o*) *Tucker v. Cracklin*, 2 Starkie's C. 385, Cor. Abbott, J.

(*p*) *Gouger v. Jolly*, Holt's C. 317.

3rdly. Proof of loss.—The plaintiff having proved * the defendant's receipt of goods on a contract to deliver them safely at some other place, it seems to be incumbent on the defendant to prove the performance of his promise. To support an averment of loss, it is enough for the plaintiff to show that the goods in fact have not arrived (*q*). PART
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Of loss.

A promise by a book-keeper to make compensation for the loss of a parcel is not binding upon the master, unless he be proved to be a general agent of the master for such purposes (*r*).

Proof of the loss of goods by a carrier will not be sufficient to maintain a count in trover (*s*); but trover lies against a carrier who delivers the goods to a wrong person, although by mistake (*t*). And if a carrier refuse to deliver goods in his possession to the owner after demand, it will be evidence of a conversion (*u*) (1).

According to the well-known rule of law, a carrier is liable for all losses, and injuries to the goods, except such as arise from the act of God, or the king's enemies (*x*) (2), Proof in de
fence.

(*q*) 2 Starkie's C. 385.

(*r*) *Olive v. Eames*, Ibid. 281.

(*s*) *Ross v. Johnson*, 5 Burr. 2825. [1 Vent. 223, *Owen v. Lewyn*.] *Kirkham v. Hargreaves*, Lanc. Sum. Ass. 1800, Cor. Graham, B. cited in Selwyn's Ni. Pri. tit. Carriers.

(*t*) *Youle v. Harbottle*, Peake's C. 49. *Syeds v. Hay*, 4 T. R. 260. [*Devereux v. Barclay*, 2 B. & A. 702. S. P.]

(*u*) 2 Salk. 655.

(*x*) 1 T. R. 27. 5 T. R. 389. 2 B. & P. 416. 1 East, 604. 3 Esp. C. 127.

(1) [Where goods were put on board the defendant's vessel to be carried to A., and on arriving there were, by the defendant's direction, put on the wharf, it was held that this was not a delivery to the consignee, and that evidence of a usage to deliver goods in this manner was immaterial, but that the defendant was liable in trover for such part of the goods as was not actually delivered to the consignee. *Ostrander v. Brown & al.* 15 Johns. 39.]

(2) [*Colt v. McMechen*, 6 Johns. 160. *Elliott v. Rossell*, 10 Johns. 1. *Murphy & al. v. Staton*, 3 Munf. 239. acc. Thus where the master of a vessel plying between New York and Albany received flour on board to be carried to New York and there sold in the usual course of business, for the ordinary freight, and having sold the flour in New York for cash, was robbed of the money; the owners of the vessel were held answerable for the money to the shippers of the flour. *Kemp v. Coughtry*, 11 Johns. 107. The master and owner of a ship are responsible for the goods they have undertaken to carry, if stolen or embezzled by the crew, or any other person, though no fault or negligence may be imputable to

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Proof in de-
fence.

* 336 as by lightning, or by a hostile invading force. He is liable, therefore, although it appear that the goods were destroyed in consequence of a casual fire which broke out in a booth at the distance of an hundred yards from the place where the defendant had deposited the goods to be ready for carriage, although the jury negative any negligence on the part of the defendant (*y*); so where the goods had * been carried from *A.* to *B.* where the plaintiff lived, and were accidentally burnt in a warehouse there before they had been carted to the plaintiff's house, the carriers were held to be liable, although the warehouse did not belong to them, and although they allowed the profits of cartage which they received to another person (*z*).

A carrier is liable, although the plaintiff sends a servant of his own with the defendant's cart to guard the goods, and although he is not a common carrier, if he undertakes for the safety of the goods (*a*). So it is no defence that the damage was occasioned by the wrongful act or negligence of a third person (*b*). This is a rule of policy and convenience in order to make carriers more careful; for if a carrier were to be excused where the damage was occasioned by the misconduct or negligence of strangers, when

(*y*) *Forward v. Pittard*, 1 T. R. 27. See also *Hyde v. The Trent Navigation Company*, 5 T. R. 389.

(*z*) *Hyde v. The Trent Navigation Company*, 5 T. R. 389.

(*a*) *Robinson v. Dunmore*, 2 B. & P. 416. So, though a man travel in a stage-coach, and take his portmanteau with him, although he has his eye upon the portmanteau, the carrier will be responsible if the portmanteau be lost. Per Chambre, J. 2 B. & P. 419.

(*b*) Per Ashhurst, J. 3 Esp. C. 131.

them. *Schieffelin v. Harvey*, 6 Johns. 170. *Watkinson v. Laughton*, 8 Johns. 213. *Foster & al. v. Essex Bank*, 17 Mass. Rep. 510, per Parker, C. J. See *Walter v. Brewer*, 11 Mass. Rep. 99. *Dean v. Swoop*, 2 Binney, 72. In *Richards v. Gilbert*, 5 Day, 415, it was held that where the owners of a vessel undertook to carry goods for hire from one port to another, and during the passage, the river became obstructed with ice, they were liable as common carriers for the damage sustained.

Where a vessel was beating up the *Hudson*, against a light and variable wind, and being near shore, and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; it was held that the carrier was excused, the accident not being imputable to his negligence. *Celt v. M'Mechen*, ubi sup. If the vessel of a common carrier strike on a rock not generally known, and not known to the master, and if he conduct himself properly and no fault be imputable to him, he is not liable. *Williams v. Grant*, 1 Conn. Rep. 487. Secus, if he be ignorant of the navigation of the river, and have no pilot on board. *Ibid.* Post, p. 337, note (1).]

he found that to be the case he would give himself no more trouble about the goods (b). He is liable, although the goods were taken by robbers, using force which he could not resist (c).

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But it is a good defence to show that the goods were sunk in the vessel in which they were sent, in consequence of a sudden squall of wind, or that they were thrown overboard to lighten the vessel, in order to save the passengers in a storm (d). Loss by the act of God.

In order to prove a destruction or loss by the king's enemies, the goods having been taken by an armed * force, it must be proved that they were taken by robbers * 337 or pirates (e).

There is no distinction between a land and water-carrier (f) (1); and the rule extends to a wharfinger who conveys goods from a wharf to vessels in his own lighters (g).

The most common defence in actions of this nature is by proof that the defendant has limited his common-law responsibility, by a notice to that effect to the plaintiff; for since, in point of law, it is competent to a carrier so to Proof of notice.

(b) Per Ashhurst, J. 3 Esp. C. 131.

(c) Per Ld. Mansfield, C. J. and Buller, J. 3 Esp. C. 131. [Ante, p. 335, note, (2).]

(d) 1 Roll. Abr. 79. [Smith v. Wright, 1 Caines' Rep. 43.] A delivery under a bill of lading to a wharfinger according to the usual course of business is sufficient. Hyde v. Trent Navigation Company, 5 T. R. 389.

(e) 1 T. R. 33. 1 Vent. 190.

(f) 3 Esp. C. 127. [Harrington v. Lyles, 2 Nott & M'Cord, 88. Williams v. Branson, 1 Murphey, 417. Edminson v. Barter, 2 Hayw. Tenn. Rep. 114. Elliott v. Russell, 10 Johns. 1. Colt v. M'Mechen, 6 Johns. 160. Bell v. Read & al. 4 Binney, 127.]

(g) Maving v. Todd, 4 Camp. 224. 1 Starkie's C. 72.

(1) [He who undertakes to transport goods by water, for hire, is bound to provide a vessel sufficient in all respects for the voyage, well manned, and furnished with sails, anchors, and all necessary furniture; and if a loss happen through a defect in these respects, he must make it good. Bell v. Read & al. 4 Binney, 127. If there be a want of seaworthiness, it renders the carrier liable, though the loss does not proceed from that cause; but if it appear that the loss may fairly be attributed to inevitable accident, the *onus probandi* of unseaworthiness lies on the owner of the goods. Ibid. Where, however, a vessel founders, the carrier must prove that she was seaworthy, before he can bring himself within the excuse of its being an inevitable accident. Ibid. S. P. Murphy & al. v. Staton, 3 Munf. 239. See Putnam v. Wood, 3 Mass. Rep. 481. Wallis & al. v. Cook, 10 Mass. Rep. 510. Ante, p. 335, note (1).]

PART limit his liability, if he can show that the plaintiff had pre-
IV. vious notice of the terms on which the defendant under-
 ——— took to deal, there is an end of his common-law liability,
Proof of notice. and the notice of those terms constitutes a special and
 particular contract between the parties.

To establish a defence of this nature, the defendant must prove, in the first place, that the plaintiff had notice of the defendant's terms. The burthen of proof lies upon the defendant: it is not sufficient to show that he has used means to give notice, he must prove that such means have been effectual. The most usual evidence to show this is by proof that a notice was put up in the office, where goods are received and entered for the purpose of carriage, in so conspicuous a situation that it must (unless he were guilty of *wilful negligence*) have attracted the attention of the plaintiff or his agent, for a notice to the agent under such circumstances is notice to the plaintiff himself. This proof fails where the party who delivers the goods at the office cannot read (*h*); and where the goods were delivered by a porter who admitted that he had frequently been at the defendant's office, and that he
 * 338 * had seen a painted board, but did not suppose that it contained any thing material, and in fact had never read it, it was held, that although the board in fact contained a notice of limitation, the evidence of notice was insufficient, and that it was incumbent on a party who wished to rid himself of his common-law responsibility, to give effectual notice (*i*). So, the proof failed where the notice at the office at Cheltenham stated the advantages of carriage by the particular waggon in large letters, and the notice of non-responsibility in small characters (*k*), although at the *termini* of the carrier's route, notice was given at the offices by means of a board inscribed with large letters. So also where the goods are not delivered at the office where the notice is exhibited, but are delivered into a cart sent round to receive goods (*l*), or at an intermediate stage between the two places, from each of which the carrier conveys goods to the other, if there be no notice at the place of delivery, although notices are suspended at the two *termini* (*m*).

(*h*) *Davis v. Willan*, 2 Starkie's C. 279.

(*i*) *Kerr v. Willan*, 2 Starkie's C. 53, Cor. Ld. Ellenborough, C. J., and afterwards by the Court of K. B.

(*k*) *Butler v. Heane*, 2 Camp. 415.

(*l*) *Clayton v. Hunt*, 3 Camp. 27.

(*m*) *Gouger v. Jolly*, 1 Holt's C. 317.

Another usual mode of proof is by evidence that notice was given by means of printed cards, or by advertisements in the public newspapers; but this is insufficient, unless it be proved that the plaintiff has seen such cards, or read the newspapers (*n*).

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By advertise-
ment,

Where it appeared on cross-examination of one of the plaintiff's witnesses, that the plaintiff had been in the habit of sending parcels by that conveyance, and that two parcels had at different times been lost, and * that the plaintiff had acquiesced in those losses, desiring the witness for the future to insure the parcels sent, it was held to be evidence of the plaintiff's knowledge that the defendants limited their responsibility (*o*).

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In the next place, if the notice be brought home to the plaintiff, it must appear, that in point of law it is sufficient to protect the defendant in the particular instance, either in toto, or *pro tanto*. This of course is a matter of pure legal consideration for the decision of the Court (*p*) (1).

(*n*) *Clayton v. Hunt*, 3 Camp, 27. As to proof of notice in an advertisement, see *Jenkins v. Blizzard*, 1 Starkie's C. 418. *Leeson v. Holt*, 1 Starkie's C. 186.

(*o*) *Roskell v. Waterhouse*, Cor. Abbott, L. C. J. 2 Starkie's C. 461.

(*p*) Where the notice was, "that cash, plate, jewels, &c. will not be accounted for, if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value," the Court held that the defendants were not liable to any extent, the parcel (containing light guineas) not having been entered and paid for as valuable (*Clay v. Willan*, 1 H. B. 298). Where the notice was, "that the proprietors of coaches transacting business at this office will not be accountable for any passenger's luggage, money, &c. or any package whatsoever, if lost or damaged, above the value of 5*l.*, unless insured and paid for at the time of delivery," it was held that the plaintiff having delivered goods of a greater value than 5*l.* without insuring or paying for them when delivered, could not recover even to the amount of 5*l.* *Nicholson v. Willan*, 5 East, 507. See also *Izett v. Mountain*, 4 East, 371; where the notice was nearly in the same terms.

In *Beck v. Evans*, 16 East, 244, where the proprietors of a public waggon gave notice that they would not be answerable for cash, bank-notes, writings, jewels, plate, watches, lace, silk hose, wool, muslins, china, glass, paintings, or any other goods of what nature or kind soever, above the value of 5*l.*, if lost, stolen or damaged, it was held that the notice did not extend to goods of large bulk and known quality, where the value must be obvious, such as a large cask of brandy. There was, however, in the above case, proof of

(1) [In an advertisement by proprietors of a stage-coach, stating the route, fare, &c. the clause "all baggage at the risk of the owners," applies only to the baggage of the passengers. *Dwight & al. v. Brewster & al.* 1 Pick. 50.]

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IV.

Notice.

* Where a carrier affixes one notice to his counting-house, and delivers another to the party, he is bound by that which is the least beneficial to himself (*q*). So if he circulate hand-bills, limiting his liability, he cannot further restrain it by evidence of a notice upon a board in his office (*r*).

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Proof in reply
to notice.—
Negligence.

Where the plaintiff declared in *assumpsit* for not safely carrying, and the defendant proved a notice to the plaintiff, couched in the usual form, it was held that the plaintiff could not, as the declaration was framed (at all events,) insist that the loss was not protected by the notice, the goods having been stolen from the * defendant's warehouse before the carriage of the goods commenced, the plaintiff ought for that purpose to have charged the defendants as warehousemen, and not as carriers (*s*).

Such a notice will be unavailable if the plaintiff prove

gross negligence. Bayley, J. doubted whether the words of the contract extended to a case of gross negligence.

Where a carrier by water had given notice that he would not be answerable for *any damage*, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 per cent. on the damage, so as the whole did not exceed the value of the vessel and freight, it was held that he was answerable for a damage arising from a leakage, on the ground that it was a personal default in the carrier himself in not providing a sufficient vessel, and that the loss was not within the scope of the notice. *Lyon v. Mells*, 5 East, 427.

C. one of several coach-proprietors, in consideration of a favour conferred upon himself, undertook that he and his partners would carry the plaintiff's own family and private parcels free of expense, and they were so carried for two years, and the word "banking," which was usually written upon the parcels, was omitted on the suggestion of C., and the word "carrier" written in its place, to which C. or his son usually added the word "free," there was no evidence that the other proprietors (partners with C.) had notice of this agreement. The defendants had given notice that they would not be liable for any parcels of above the value of 5*l.*, unless entered and paid for, &c. A parcel of the plaintiff's, delivered under these circumstances, of considerable value, having been lost, it was held that the plaintiff was not entitled to recover against the partners. For even where the carrier under such circumstances undertakes to carry without reward, notice of value ought to be given, in order to point his attention to the particular goods; he does not dispense with notice in toto, but only with payment: also, because there was no notice to the other partners; and notice to one partner is not notice to all, unless the transaction be *bona fide*. There was no consideration between the plaintiff and the other partners, and therefore no contract.

(*q*) *Munn v. Baker*, 2 Starkie's C. 255.

(*r*) *Cobden v. Bolton*, 2 Camp. 108.

(*s*) *Roskell v. Waterhouse*, 2 Starkie's C. 461.

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that the defendant has been guilty of gross negligence, in consequence of which the goods have been lost or injured. Conditions of this nature were introduced for the purpose of protecting carriers against extraordinary events, and not to exempt them from due and ordinary care (*t*). As where the defendant's agent knew that a cask of brandy was leaking fast in the course of the carriage, and yet took no pains to stop it (*u*).

Proof in reply
to notice.—
Negligence.

A parcel of bank-notes had been sent by a coach from Hereford to Brecon, and their value was known to the agent of the defendants; on the arrival of the coach at Brecon the book-keeper, who usually unloaded the coach, received the way-bill in which the parcel was entered, but supposing that the coachman had the parcel about his person, did not ask him about it, or look for it in the coach, in the back seat of which the parcel had been deposited; it was left to the Jury to say whether the defendants had not been guilty of gross negligence, the Jury found for the plaintiffs, and the Court of Exchequer afterwards held that in such a case a notice of non-liability, which the defendants had given, did not protect them (*v*).

(*t*) Per Wood, B. 4 Price, 34.

(*u*) *Beck v. Evans*, 16 East, 244, *supra*, 339.

(*v*) *Bodenham v. Bennett*, 4 Price, 31. See also *Tyly v. Morris*, Carth. 485. *Gibbon v. Paynton*, 4 Burr. 2298. 3 Taunt. 264. In the case of *Batson v. Donovan*, 4 B. & A. 21, the plaintiffs, after notice by the carrier, delivered a parcel of bank notes to a large amount to the carrier, without informing him of its contents; the coach in which the parcel was conveyed was left at midnight in the middle of a very large street with a porter, who was ordered to watch it; during this time the parcel was stolen. The Court held that it had been properly left to the Jury to say, first, whether the plaintiffs had been guilty of any unfair concealment of the value of the property; secondly, whether the carrier had been guilty of gross negligence. The Jury found for the defendants, and the Court of King's Bench on a special case refused a new trial. Best, J. dissentient. So in *Bodenham v. Bennett*, 4 Price, 31; where the driver of the coach upon its arrival was in liquor, and the book-keeper, who saw the parcel in the way-bill, supposing that the coachman, according to custom, had it on his person, did not ask for it, or look into the coach for it, it was held to be a loss arising from gross negligence. So in *Duff v. Budd*, 3 B. & B. 177, where a parcel directed to a particular place had been mis-delivered, it was left to the Jury to say, whether the defendants had been guilty of gross negligence; and it was held, that the usual carriers notice, and a subsequent correspondence with the carrier, with a view to detect and punish the fraud by which he had been misled, did not amount to a bar or waiver of the action. So, also, where goods sent to *A.* and *B.* to be carried by a mail-coach were taken out and left to be forwarded by a coach, of which *B.* alone was the proprietor, and were lost. *Garnett v. Willan*, 5 B. & A. 53; for this was not a loss

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Proof in reply
to notice.—
Negligence.

Where the defendant's agent in the course of delivering out parcels in London, carried in a cart, left the cart in the street, and the plaintiff's parcel was stolen * out in his absence, the Jury found it to be gross negligence in the defendant (x).

Where the owner of vessels navigating from *A.* to *C.*, gave notice that he would not be answerable for losses, received goods at *A.* to be carried to *B.*, an intermediate place, and instead of delivering them at *B.*, took them on towards *C.*, and before their arrival at *C.* the goods were sunk, without any want of care in the master, it was held that the defendant, who ought to have delivered the goods at *B.*, was liable to the full amount (y).

Where a box was sent from London directed to *J. W.* Exeter, and was delivered at the coach-office in Exeter on a Sunday evening, to a stranger, who said that he had been employed by a man in the street to call for *W.*'s box, it was held that there was sufficient evidence of gross negligence to go to a Jury (a).

Notice of
value.

Where the defendant's agent was informed of the nature and value of the article, and told to charge what he pleased for it, it was held that the defendant was answerable for the loss, notwithstanding the notice in the usual form, on the ground that the payment on delivery had been dispensed with (b). But the usual notice will exempt the carrier from liability, notwithstanding the bulk of the package, unless the nature of the goods be *known* to the carrier, and is such that the value of the goods must necessarily exceed the value specified in the notice (c) (1). And even where

within the terms of the notice, but a consequence of a wrongful act, by which the defendants divested themselves of the charge which they had undertaken. So in *Short v. Fagg*, 5 B. & A. 342, where a parcel of notes packed in brown paper was sent without any communication as to value, to be conveyed by the mail, but was forwarded by a light coach, from which it was stolen. In an action on the case against carriers for misfeazance, the plaintiff may recover against some of the defendants. *Bickerton v. Wood*, 3 B. & B. 54.

(x) *Allen v. Imlet*, Holt's C. 641.

(y) *Ellis v. Turner*, 8 T. R. 531.

(a) *Birkett v. Willan*, 2 B. & A. 356. The defendants had proved the usual notice.

(b) *Wilson v. Freeman*, 3 Camp. 527. And see Vent. 238.

(c) *Down v. Fromont*, 4 Camp. 40.

(1) [The responsibility of carriers is the same, whether they are informed that a package contains money, or papers as valuable as money. *Dwight & al. v. Brewster & al.* 1 Pick. 50.]

it was proved that the defendant's book-keeper knew the value of the parcel (containing 200 guineas), but nothing was said to him as to the contents or value, * and the parcel was lost, it was held that mere knowledge of the value did not defeat the notice of non-liability (d).

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The defendant may also in this, as in other cases, set up fraud on the part of the plaintiff as an answer to the action. Thus, where the plaintiff at *W.* apprehending, from the disturbed state of the country, that his corn was in danger of being seized by a mob, after having written to the defendant, a carrier by water, to send a private boat, stopped a boat of the defendant passing from *R.* to *B.*, which was not one of the boats employed in carrying goods from *W.* to *B.*, and without communicating the circumstances to the boatmen, prevailed upon them to take the goods on board, and the corn was seized by the rioters, and lost, it was held, principally on the ground of fraud apparent on the transaction, the circumstances and urgency of the case not having been communicated to the boatmen, that the plaintiff was not entitled to recover (e).

Proof of fraud.

Where, on the delivery of a box to the carrier, he asked what was in it, and the owner answered a book and tobacco, as in fact so there was, but there was also 100*l.* besides, and the carrier was robbed, Rolle, C. J. is reported to have held at *Nisi Prius*, that the defendant was answerable, for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance (f). But where a carrier received two bags of money sealed up, and was told that they contained *200*l.*, and a receipt was given, charging 10*s.* per-cent. for carriage and risk, and the bags, of which the carrier was robbed contained 400*l.*, it was held that the plaintiff could not recover more than 200*l.* (g); and it may be doubted whether the defendant would now be considered as liable even to that extent, and whether the whole contract would not be considered as avoided by the fraud.

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The defendant may also show in defence that the loss has resulted from the improper and negligent manner in

(d) *Levi v. Waterhouse*, 1 Price, 280.

(e) *Edwards v. Sherratt*, 1 East, 604. It was left by Rooke, J. to the Jury to say whether the goods were put on board according to the usual course of dealing with a common carrier; the Court held that the direction was proper, and that it was in effect a question whether the boatman acted under the proper authority of his employer when he took the corn on board.

(f) 1 Bac. Ab. 556.

(g) B. N. P. 71. 1 Bac. Ab. 346.

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IV.

Fraud.

which the goods have been packed, or delivered by the plaintiff. Where a carrier gave a receipt for a dog, which was afterwards lost, it was held to be no defence that the dog had not been delivered in a state of security, there being no collar about his neck, but only a cord. *Ld. Ellenborough* ruled, that after a complete delivery to the defendant, the property remained at his risk, and he was bound to use proper means for securing it (*h*).

Carriers of
persons.

In an action against a coach-owner for an injury sustained by a passenger, the plaintiff must prove, not only the usual engagement to carry him, by proof that he has taken his place, &c. (*i*), but must prove *negligence*, for coach-owners do not insure the persons of passengers against accidental injuries (*k*). But upon general principles, the owners of mail and other coaches are liable for injuries occasioned by the negligence of their agents (*l*). The breaking down or overturning of a stage-coach is *prima facie* evidence of negligence. Where the road was such as to require an extraordinary * 345 * degree of caution on the part of the passengers, a driver was held to have been guilty of negligence in not warning them of the full extent of the danger (*m*). Evidence that the coach at the time of the overturning was carrying a greater number of passengers than are allowed by the act of parliament (*n*), has been held to be conclusive to show that the accident arose from the overloading of the coach (*o*); on the other hand, if it appear that a coach is loaded with more passengers than its construction will bear, it is no excuse that the number did not exceed the statutory allowance (*p*). If the driver of a coach may adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues (*q*).

(*h*) *Stuart v. Crawley*, 2 Starkie's C. 323.

(*i*) See the observations, *supra*, 330, 1.

(*k*) *Aston v. Heaven*, 2 Esp. C. 533. *Christie v. Griggs*, 2 Camp. 79.

(*l*) *White v. Boulton & others*, Peake's C. 81. *Brucker v. Fromont*, 6 T. R. 659. 2 Salk. 441. *Michael v. Allestree*, 2 Lev. 172.

(*m*) *Christie v. Griggs*, 2 Camp. 79. As where the coach, before it reached its usual destination, had to pass under a low gateway, and it was scarcely practicable for a passenger on the roof of the coach to pass without injury, and the coachman merely informed the passenger that the passage was very *awkward*. [See also *Dudley v. Smith*, 1 Camp. 167.]

(*n*) 50 Geo. III. c. 48, s. 2.

(*o*) *Israel v. Clarke*, 4 Esp. C. 259.

(*p*) *Ibid.*

(*q*) *Mayhew v. Boyce*, 1 Starkie's C. 423.

If through the default of a coach proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, and in consequence his leg be broken, the proprietor will be responsible in damages, although the coach was not actually overturned (*r*).

CASE, ACTION ON.

In general, in an action on the case, the whole of the allegations upon the record are put in issue by the plea * of not guilty, and the plaintiff is bound to prove so much * 346 of the case, as stated on the record, as will entitle him in point of law to a compensation in damages.

For the proofs in particular actions of this class, see the different heads *Carriers*.—*Criminal Conversation*.—*False Representation*.—*Disturbance*.—*Libel and Slander*.—*Lights*.—*Malicious Arrests and Prosecutions*.—*Negligence*.—*Nuisance*.—*Reversion*.—*Seduction*.—*Sheriff*.—*Trover*.—*Watercourse*.—*Way*.

The proof of the different averments essential to support an action on the case in *tort*, and the necessity of the correspondence of such proofs with the allegations upon the record, will be severally considered under the respective appropriate titles. Some, however, of the principal and general rules upon the latter point will be noticed in this place. The great and general rule upon this subject is, Variance, that a variance in the degree and extent of the injury proved from that alleged, will not preclude the plaintiff from recovering, provided he proves a legal cause of action, corresponding with averments on the record, although differing in extent; for although the Jury would not be warranted in finding that to be proved which is not proved *at all*, they may justly find that which is alleged to have been proved *in part*, and award damages accordingly.

In the first place, it is perfectly clear, as a general position, that the plaintiff is entitled to a verdict, if *he proves* such averments as constitute a ground of action, although no proof be given of other averments which show that an injury has been done to a greater degree and extent, or which are immaterial to the cause of action (*s*). Thus in an action for slander he is entitled to recover if he prove some of the words as laid which * are actionable, although he fails in * 347 proving others which are also actionable (*t*). So if he omit

Omission to
prove particular
averments.

(*r*) *Jones v. Boyce*, Ibid. 493.

(*s*) Per Parker, J. Gilb. L. E. 229.

(*t*) *Compagnon v. Martin*, 2 Bl. Rep. 794. Hardr. 470.

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Variance, in
omission to
prove aver-
ments.

Averments
when immate-
rial.

Divisibility of.

to prove circumstances in aggravation, or the extent of damages as laid in the declaration (*u*).

Upon an indictment even for murder, where it was alleged that the sheriff made a precept to the serjeant at mace in London (the deceased) for the arrest of the prisoner, and it turned out in evidence that there was no such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request, upon the entry of the plaint, according to the custom of the city, it was held that the variance was not material, the substance of the matter being found, which was whether the prisoner killed the officer in the execution of legal process (*x*).

Previous then to the consideration of the proof which is requisite to support an averment which is material, it is essential to consider what averments may be rejected as surplusage. The general rule is "*utile per inutile non vitiatur*," and therefore, it is clear that all those averments which are wholly impertinent, or which may be rejected without prejudice to the cause of action, require no proof. But difficulties as to such rejection frequently arise, in some instances, from the mode in which *useless* circumstances are averred, conjointly with the useful facts upon the record, and in others from the particular and precise mode used in the allegation of *essential* facts.

* 348 It seems to have been doubted, whether an averment can be considered to be material as to part, whilst another part is rejected as surplusage (*y*). In considering, however, what may be considered to be immaterial, and * capable of being rejected, it should seem that regard ought rather to be had to the divisibility of the facts and circumstances themselves, than to the mode of their combination and connection by the particular phrases used upon the record; and if the facts and circumstances be divisible, abstractedly considered, to consider them still to be so, although combined in the same sentence in the pleadings. This rule has been adopted even in criminal cases, where, out of tenderness to life, greater accuracy has invariably been required than in civil proceedings. Thus in *Pye's* case, the indictment alleged that he robbed Robert Fernyough in the dwelling-house of Aaron Wilday (*z*); the fact appeared to have been committed in a house, but it did not appear

(*u*) 1 Bl. Rep. 198. *Gardiner v. Croasdale*, 2 Burr. 904. S. C.

(*x*) *Mackally's* case, 9 Co. 62. East's P. C. 345.

(*y*) See the observations of Rooke, J. 3 B. & P. 463.

(*z*) East's P. C. 785. And see *Wardle's* case, *ibid.*; and Stark. Criminal Pleadings, tit. *Surplusage*.

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who was the owner, and yet the conviction was held to be good. Here, although the circumstance that the offence was committed in the particular dwelling-house was alleged in the same sentence with the robbery itself, it was held to be capable of separation from it, and of rejection as surplusage, just as much as if it had been the subject of a distinct and separate allegation, a conclusion necessarily grounded on the consideration that the circumstance of place was separable from the circumstances which were well alleged to constitute the robbery.

Averments
when imma-
terial.

Where the declaration in an action against the marshal for an escape alleged that the party who had been arrested on *mesne* process, had been brought before a Judge by virtue of a writ of *habeas corpus*, and had been by him thereupon committed to the marshal, as by the record thereof now remaining in the Court of our said Lord the King, &c. more fully appears, the evidence was the production of the original writ, with the *commititur* annexed, by the clerk of the papers of the King's * Bench-office, * 349 with whom, as the agent of the marshal, such documents had for a considerable period been deposited; and the Court held, that the allegation as to the writ and *commititur* remaining of record was either impertinent, and might be rejected as surplusage, and as requiring no proof, or that it required no other proof than had been received by the production of the writ and return, which are *quasi* of record (a).

Where the plaintiff averred, that at the time of the injury committed, his close was, (and at the time of the action still was,) in the occupation of *J. V.* and *H. V.*, and it appeared that the close was in their possession at the time when the injury was committed, but that the occupation had been changed before the action was brought, it was held that the allegation was sufficiently proved (b).

An allegation that the plaintiff's boat was run down by the defendant's, in the Thames, near the half-way reach, was sustained by proof that the fact happened in the half-way reach (c).

The effect of variance will be afterwards more fully considered (d); but from such instances it may perhaps be

(a) *Wigley v. Jones*, 5 East, 439. See *Turner v. Eyles*, 3 B & P. 456; which differs from the preceding case in this respect, that the party was taken in execution. See also 2 Str. 1226. *Unwin v. Kircheff*, Ib. 1215; and *Pearson v. Rawlins*, 1 East, 405.

(b) *Vowles v. Miller*, 3 Taunt. 137.

(c) *Drewry v. Thoiss*, 4 T. R. 558.

(d) Under the particular heads, and also under the tit. *Variance*.

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IV.Averments
when immate-
rial.

* 350

When mate-
rial.

inferred, that the true distinction is between such circumstances as can be separated and divided from the principal fact alleged, leaving a sufficient allegation still remaining, and those circumstances which are not divisible from the fact, but so connected with it, that if the circumstance, were omitted there would be no allegation of the essential fact itself. Thus, if the plaintiff * in an action for an injury in his reversionary interest to lands in the occupation of *A. B.*, were to allege that the lands were in the possession of *C. D.*, the variance would be fatal; it would be a misdescription of the subject matter injured; and if the allegation of the possession by *C. D.* were to be struck out altogether, there would be no allegation to show the plaintiff's reversionary interest; but if the plaintiff in such a case alleged that at the time of the injury *A. B.* was, and *still was*, possessed of the land, and *A. B.* was in fact tenant of the land at the time of the injury, but had before the action ceased to be the plaintiff's tenant, the variance would be immaterial, for the fact that *A. B.* still continued to be tenant, might be divided and separated from the fact that he was tenant at the time of the injury, without affecting the cause of action (*e*). But next, if a party allege that specifically and particularly which he might have alleged generally, he will be bound by the precise nature of his allegation to the particular mode of proof. Thus, if a party derive his right of action against the debtor through a variety of deeds, instead of charging him 'generally by virtue of divers mesne assignments, he must prove the deeds as stated (*f*). So, if a party claiming under a demise take upon himself to state a demise by *indenture*, he must prove his allegation, though a general averment of a demise would have been sufficient (*g*) (1).

In actions for nuisances to the plaintiff's property, as by diverting water-courses, although it may not have been necessary to give a precise local description of the injury, yet if such a description be given, it must, it seems, be proved as laid. Thus where the plaintiff * 351 * in an action against the defendant, for erecting a weir

(*e*) See *Vowles v. Miller*, 3 Taunt. 137.

(*f*) 3 B. & P. 461.

(*g*) Ibid.

(1) [See, on this subject, 2 Saund. 207. *a. note* (24). 1 Saund. 346. *note* (2). 1 Chit. Pl. 231. 524. Yelv. 195. *a. note* (1), and cases there collected. Dalison, 42. pl. 20. *Swallow v. Beaumont*, 2 B. & A. 765.]

to the prejudice of the plaintiff's mill, alleged that it was erected at the *Hulbrook*, whereas in fact it was erected at a lower part of the water called the *Tamewater*, Wilson, J. nonsuited the plaintiff, and the Court of King's Bench afterwards held that the nonsuit was proper (*h*). In such a case, it is to be observed that the precise description identifies the injury, and so far ascertains its nature and extent as to distinguish it completely from an injury of the same kind committed in a different situation; and as the record would be afterwards evidence of the rights of the parties, it is reasonable that the plaintiff should be bound to prove his injury as alleged; but if it be doubtful whether the place was alleged as descriptive of the injury, or merely by way of *venue*, it will be ascribed to *venue*, and a variance will be immaterial (*i*).

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Averments
when material.

In an action on the case for setting a mark in front of the plaintiff's house, in order to defame him as the keeper of a bawdy-house, he alleged the house to be situated in a certain street called Artillery-street, to wit, in the parish of the Old Artillery-ground, in the county of Middlesex, (there being no such parish), and afterwards alleged the nuisance to have been erected and placed in the parish aforesaid, it was held that the injury was not of a local nature, and that the place was mentioned as mere matter of *venue*, and not of local description (*k*).

It is a rule that if an averment be *material*, it must be *substantially proved*, although it be averred only as matter of inducement (*l*).

Proof of a material averment.

Substantial proof must be estimated according to its * subject-matter. This may be of so entire and specific a nature as to admit of little or no variance from its precise terms, in other words, a variance from its precise terms in proof would render the thing proved essentially different from that alleged. This happens where a contract, prescription, custom, or written document is precisely set forth, or where the name of a person (not a party) is alleged.

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In the case of a *contract*, if the promise or consideration proved differ from that alleged, the two contracts essentially differ, they cannot be the same, and the promise and consideration being integral parts of the contract, a differ-

Contracts.

(*h*) Cited 2 East, 500.

(*i*) *Mersey & Irwell Navigation Company v. Douglas*, 2 East, 497.

(*k*) *Jefferies v. Duncombe*, 11 East, 226. 2 Camp. 3. S. C.

(*l*) 3 B. & P. 463. *Gwinnett v. Phillips*, 3 T. R. 643.

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IV.

Proof of a material averment.—
Persons.—
Custom and prescription.

once as to either destroys the identity of the whole. So where the allegation relates to an individual *person*, a variance from his name in proof, from which it appears that the name was wholly mistaken, destroys the identity of the facts alleged and proved. So it happens, as will be seen, where a custom or prescription is alleged, or the contents of a document are described by the tenor. In such cases, were the single allegation is disproved by the evidence, if the averment be a material one, it will follow that the whole charge is disproved, for the proof cannot correspond with the whole charge when it differs in a material fact. It is a necessary consequence, therefore, that such a variance is fatal, for if one such variance were to be considered to be immaterial, a second or third might also be disregarded; the result would be the introduction of a most mischievous laxity of proof, and the forms of pleading would manifestly become useless when it was no longer required that the proofs should correspond with them.

Magnitudes.

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Where on the other hand the proof differs from the allegation merely in quantity or extent, and the quantity or magnitude is not essential to an entire subject-matter, such as a contract, prescription, custom, or * written document, the case is very different; here the allegation is proved in specie, and is capable of being corrected by the finding of the Jury as to the amount; and this observation applies generally to all allegations of time, place, quantities, and magnitudes, which do not form part of an entire subject-matter; for instance, if the plaintiff allege that the defendant has diverted his watercourse for two months, and prove that he has done so for one month, the allegation is proved except as to the duration of the injury, it is established in specie; and the Jury may properly find that the defendant committed the very injury complained of, although to a less extent, and award damages accordingly. But if on the other hand the plaintiff were to allege that the defendant had corruptly agreed to forbear the sum of 100*l.* for the space of one month, in consideration of receiving the sum of 10*l.* for the loan, and it turned out in evidence that the agreement was to forbear the sum of 100*l.* for two months, for the same consideration, although the evidence proved an usurious contract, and less usurious than that alleged, yet the Jury could not find the usury to the less amount, because the contracts are entire, and essentially differ from each other; the objection is not that the usury is not proved to the full extent, but that the usury alleged is not proved at all; and the Jury cannot find that any part of that contract which has been alleged is proved.

The subject of variance, as it relates to contracts (*m*), prescriptions, customs, and written documents, will be more properly considered elsewhere; at present, a few observations will be made as to variance from the proof in actions on the case. In the first place, if in * such an action, a contract, written document, or other entire subject-matter be alleged, it must be proved in the same manner as if the action were founded upon it. Thus, where in the declaration the deceit was alleged to have been effected by means of a warranty made by two defendants upon a joint sale by both, and the proof was of a sale and warranty by one only, as of his separate property, it was held that the variance was fatal. It was contended that *torts* are in their nature several, and that one defendant in such an action may be acquitted and the rest found guilty; but the Court held, that as the allegation was a material one it could not be rejected, and that wherever the allegation of a contract becomes material and essential, whether the action be in debt, *assumpsit*, or *tort*, it must be strictly proved, being in its nature entire and indivisible (*n*). So in an action against the sheriff for taking goods without levying a year's rent, where the plaintiff (unnecessarily) set out the particulars of a demise, and failed to prove them as laid, he was nonsuited (*o*).

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IV.

Variance.—
Proof of con-
tracts.
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The allegations in actions on the case are of parties, time, place, the means and manner of committing the injury, collateral circumstances, and situation of the parties (*p*), descriptions of persons and things (*q*), quantities, and magnitudes (*r*). Allegations in case.

Some points will now be considered which are particularly applicable to the present form of action. Parties.

The action must in general be brought by the party whose person or property has sustained the injury * complained of. Thus the vendor of goods cannot maintain an action for their loss against the carrier, where the property has vested in the vendee by the delivery to the carrier on his behalf (*s*). So where *A.* chartered the whole of the defendant's ship, the defendant agreeing to receive a full car- * 355
Plaintiff

(*m*) See these titles respectively; and also *Forgery—Libel—Variance*.

(*n*) *Weall v. King*, 12 East, 451.

(*o*) *Bristow v. Wright*, Doug. 667. 1 T. R. 236.

(*p*) See tit. *Character*.

(*q*) See tit. *Larceny—Trespas—Trover*.

(*r*) *Ibid*.

(*s*) *Supra*, tit. *Carrier*, p. 332.

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IV.Parties.—
Plaintiffs.

go, and to deliver the same to *A.* or his assigns, and the plaintiff, to whose order the goods were consigned, brought an action against the defendant for negligence in stowing the goods, and it appeared that the plaintiff was the mere agent of *A.*, he was nonsuited (*t*).

If it appear that some of the plaintiffs are not entitled to support the action, it will be a ground of nonsuit; they must recover, if at all, in respect of a general joint damage, for the Courts will not take cognizance of separate and distinct injuries in one and the same action (*u*). The plaintiffs must therefore prove a joint cause of action, such as damage done to joint property (*x*), joint slander of the plaintiffs in their trade or business (*y*); and two persons may join, although their interests be several, if the injury complained of were a joint damage to both (*z*). Where the damage is laid as a joint damage to several plaintiffs, and appears in evidence to be a separate damage to some of them only, they must be nonsuited; as, where the declaration alleged a slander of the plaintiffs in their joint trade, and it appeared in evidence * that the words were addressed personally to one only (*a*).

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Parties.

It is a general rule, that in actions of *tort* one defendant may be acquitted and another found guilty, *torts* being several in their nature (*b*); where however the action is virtually founded upon a breach of contract, doubts have been entertained upon this point. In the latest case upon the subject, the Court of King's Bench refused a new trial, leaving the defendant to take his objection, which was upon the record, by a writ of error (*c*).

(*t*) *Moores v. Hopper*, 2 N. R. 411.

(*u*) 1 Saund. 291, *g*. Bac. Ab. Action, C. 2 Saund. 116, n. 2. 2 Wils. 423; 3 Lev. 362.

(*x*) If one tenant in common only be sued in trespass, trover or case, for any thing concerning the land held in common, the defendant may plead the tenancy in common in abatement. 1 Saund. 291, *c*.

(*y*) 3 B. & P. 150. 2 East, 426.

(*z*) 2 Saund. 116, *a*. 3 Lev. 362.

(*a*) *Solomons & others v. Medex*, 1 Starkie's C. 191. And see *Barnes v. Holloway*, 8 T. R. 150. *Hawkes v. Hawkey*, 8 East, 427. *Helly v. Hender*, 3 Bulst. 83. *R. v. Berry*, 4 T. R. 217.

(*b*) 1 Will. Saund. 291, *d*. where the cases on the subject are collected.

(*c*) *Wood v. Bretherton*, K. B. Mich. 1820; *vide tit. Carriers*, p. 334. And see 1 Will. Saund. 291, *d*.; & *supra*, 334, and the cases there referred to.

The allegation of the particular day on which an injury was committed is not material, and the plaintiff may prove it to have been committed on any day before or after the day laid in the declaration provided it be before the commencement of the action (*d*), (1) whether (as it seems), the form of action be trespass or case. But if the injury be continuous in its nature, or has been repeated, it seems that the plaintiff, if there be but one count alleging a continuance or repeated acts within a time specified, may either give in evidence upon that count one act anterior to the first day specified in the declaration, or any number within the limits assigned (*e*). (2) But if the declaration contain several counts, he may give in evidence so many acts, each anterior to the first day specified in each respective count (*f*).

Time.

* Where in an action on a policy of insurance, the declaration alleged, that after the making the policy the ship sailed, and it appeared in evidence that she sailed before, the variance was held to be immaterial (*g*). * 357

Where the injury is of a transitory nature, and the place is merely alleged by way of *venue*, a variance is immaterial; and, as has been seen in actions for nuisances to real property, where there is a doubt whether the place was introduced by way of *venue*, or of local description, it will be ascribed to *venue* (*h*). Where however a precise local description is given of such an injury, it must be proved as laid (*i*). Place.

If the injury be the immediate result of force used by the plaintiff, and not the mere remote consequence of his wrongful act, the variance will be fatal, for the form of action is misconceived, it should have been laid in trespass. The distinction between such injuries as are to be laid in trespass, and consequential injuries, for which an action on the case is the proper remedy, is frequently very nice; but it is necessary that they should be attended to, in or- Means and manner.

(*d*) 1 Will. Saund. 24, n. *Brook v. Bishop*, 7 Mod. 152. *Ld. Raym.* 823. 974. 976. 2 Salk. 639. *Hume v. Oldacre*, 1 Starkie's C. 351.

(*e*) *Ibid.*

(*f*) *Ibid.*

(*g*) *Peppin v. Solomons*, 5 T. R. 496. *Matthie v. Potts*, 3 B. & P. 23.

(*h*) See Ante, p. 350, 1.

(*i*) *Ibid.*

(1) [See *Yelv.* 71, note (2) Amer. ed.]

(2) [See *Pierce v. Pickens*, 16 Mass. Rep. 470.]

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Negligence of
agent.

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der that the boundaries of actions may be kept distinct. The general rule is, that if the injury result immediately from force applied by the defendant, trespass is the proper form of action (*k*), and it is immaterial whether the trespass be wilful or not (*l*) (1).

In actions for the negligence of an agent, it is a general rule that an allegation of negligence by the defendant is supported by proof of negligence in his agent, for the negligence of the latter is the negligence * of the principal who employed him (*m*). A declaration alleging that the defendant so negligently drove his cart that the plaintiff's horse was killed, is supported by proof that the defendant's servant drove the cart and occasioned the injury (*n*). And it is a general rule in civil actions, and also in cases of indictments for treason and misdemeanors, and in some instances for felony, that the act of the agent may

(*k*) Per De Grey, C. J. in *Scott v. Shepherd*, 3 Wils. 403. 2 Bl. R. 892.

(*l*) Per Ld. Ellenborough, *Leame v. Bray*, 3 East, 599. For the decisions on this head, see *Trespass*.

(*m*) *Supra*, tit. *Agent*, 54. *Michael v. Allestree*, 2 Lev. 172, *supra*, 55.

(*n*) *Brucker v. Fromont*, 6 T. R. 659. And see *Turberville v. Stamp*, 1 Ld. Raym. 264. Skinn. 681. Carth. 425. 1 Salk. 13.

(1) [Mr. Angell, in his "Treatise on the Common Law, in relation to Water-Courses," pp. 79, 80—gives the following extract from the manuscript lectures of Judge Gould of Connecticut :

"When the original act occasioning the injury was forcible, the remedy is in some cases trespass, in others trespass on the case. If the forcible act is immediately injurious, trespass is the proper action ; if, on the contrary, the injury for which redress is sought, is the remote or consequential effect of the forcible act, the remedy is trespass on the case. As if A. throws a log across a highway, and B. injures himself by falling over it, here the injury to B. is consequential, and the remedy is trespass on the case.

"The difficulty is in applying the last rule, and in distinguishing what is the *immediate* and what the *consequential* effect of any forcible act. The injury to be immediate within the rule, need not be the instantaneous effect of the forcible act. When it is instantaneous, there is no difficulty in the application.

"Injuries, which are not the instantaneous effect of some forcible act, are in some cases regarded as immediate, in others consequential.

"1. When the immediate or proximate cause of the injury produced is but a continuation of the original force, the effect is immediate.

"2. On the other hand, when the original force ceases before the injury or damage commences, such injury or damage is consequential, and the author of it is liable in trespass on the case only."]

be alleged to be the act of the principal who gave him directions (o).

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IV.

Where in an action against *A.* for damage to the plaintiff's window, occasioned by the negligence of the defendant's servant in driving his waggon, it appeared that *A.* and *B.* were in partnership as carriers, and that by a private agreement *inter se* each undertook the conveyance of goods by his own waggons, horses, and drivers, for specified distances, and that the damage in question had been effected within *B.*'s division, and by his waggon and driver, it was held that *A.* was liable, for since the waggon was to be drawn for his benefit, for all legal purposes the servant was his, although for inferior purposes, and, as between *A.* and *B.*, he was considered as the servant of *B.* (p).

Proof of agency.

A variance from sums and quantities will not be material, unless they constitute part of a contract, or other entire subject matter. It is unnecessary to prove the precise sum as laid in support of an averment that so much was *due* for rent, in an action to recover double the value of goods removed to prevent a distress (q).

Sums, &c.

In an action on the post-horse act, for letting and *not accounting for divers, to wit, eight post-horses, proof * 359 of letting and not accounting for five was held to support the declaration (r).

Under a count for a total loss it is sufficient to prove an average loss (s).

In covenant, evidence of part of the breach will enable the plaintiff to recover *pro tanto*. Where the plaintiff alleged, by way of breach, that the defendant had pulled down the whole house, it was held that he was entitled to recover damages for pulling down half the house (t).

Damages.

It is always essential to prove the allegation that the particular damage alleged was the immediate and natural result of the wrongful act of the defendant stated in the declaration. Thus in an action for slander, by means of which the plaintiff lost his situation as a journeyman to a third person, it is not sufficient to prove, that in consequence of the wrongful act of the defendant the master dismissed the plaintiff from his employment before the

(o) *Supra*, tit. *Accessory—Agent*.

(p) *Waland v. Elkins*, 1 Starkie's C. 272.

(q) *Gwinnet v. Phillips*, 3 T. R. 643.

(r) *Radford v. McIntosh*, 3 T. R. 632.

(s) *Nicholson v. Croft*, 2 Burr. 1188.

(t) Burr. 1907. Bl. Rep. 200.

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Damages.

end of the term for which he had contracted with him, for the dismissal was not the legal and natural consequence of the words, but the mere wrongful act of the master (*u*).

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No evidence can in general be given of damage which is not specially alleged in the declaration. But where special damage is laid, the plaintiff may frequently recover in respect of that damage in this form of action, where he could not have recovered for it in trover. As, where the plaintiff alleged that the defendant wrongfully had detained the tools used by him in his * trade, for the space of two months, whereby he had lost the benefit of his trade, it was held that a special action on the case was the proper form of action, for the damages being special, the action ought to be special (*x*).

It is sufficient, in many instances, to give presumptive evidence of the loss sustained; as, in an action for firing guns so near the plaintiff's decoy-pond, that it prevented the wild ducks from coming there (*y*), or for hindering horses from being brought to the plaintiff's market, in consequence of which he lost the toll payable upon the sale (*z*). The variance from the amount of the damages laid in the declaration is immaterial.

Proof in bar.

As this action is founded on the plaintiff's title in justice and equity to receive a compensation in damages, the defendant may under the general issue, except in some instances depending on peculiar circumstances, give in evidence any facts or circumstances which in equity and conscience are sufficient to bar the plaintiff's claim (*a*). The excepted defences are, that of a justification, in an action for slander or libel, of the truth of the words; this rests on peculiar grounds; a special plea is necessary in order to apprise the plaintiff that evidence will be adduced to prove the truth of the charge of which he complains. So where the defence is founded upon the statute of limitations. The stat. 8 & 9 Will. III. c. 27, s. 6: enacts, that in an action of escape against the keeper of any prison, no retaking on fresh pursuit shall be admitted in evidence

(*u*) *Vicars v. Wilcocks*, 8 East, 1. See also *Ashley v. Harrison*, Peake's C. 194; S. C. 1 Esp. C. 48; and *Taylor v. Neri*, 1 Esp. C. 386; & *infra*, tit. *Libel*.

(*x*) *Kettle v. Hunt*, B. N. P. 78.

(*y*) *Keble v. Hickeingill*, 11 Mod. 73. 130. [11 East, 574, n.] *Tarleton v. M^r Gauley*, Peake's C. 205.

(*z*) Per Holt, C. J. *Ibid*.

(*a*) Per Ld. Mansfield, 3 Burr. 1353. [Yelv. 174, b. note.]

under the general issue, or without a special plea verified by affidavit.

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* In an action for beating the plaintiff's horse, *per quod* he was deprived of the use of it, the defendant was admitted to prove that the horse and cart of the plaintiff were before the defendant's door, and hindered him from coming to load, wherefore he whipped the horse in order to remove it (b). So in an action for obstructing the plaintiff's lights, it was held that the defendant might, under the general issue, prove that he had built upon an ancient foundation according to the custom of the city of London (c). So a release is evidence (d). So in an action for the seduction of a servant, evidence that the plaintiff had recovered a penalty against the servant, is evidence in bar of the action under the same plea (e). The defendant may, under the general issue, give in evidence a verdict and judgment in a former action as to the same subject matter between the same parties; but if he mean to rely upon it as an *estoppel* he should plead it; if he merely give it in evidence it will not be conclusive (f).

Evidence in
defence.
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It is an answer to the action to show that the profits, of which the plaintiff complains he has been deprived, were to be derived through the medium of an illegal transaction (g).

* CERTIFICATE. For *Parish Certificate*,
vide Vol. I. p. 176.

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Or a conviction of felony. By the stat. 3 & 4 W. & M. c. 9, s. 7, a transcript certified by the clerk of the crown, peace, or assizes, of the conviction of a man who has the benefit of clergy, or of a woman who has the benefit of the statute, containing the effect and tenour of the indictment and conviction, to the Judges and Justices in any other county where such man or woman shall be indicted, on being produced in Court, shall be evidence of the fact of

Conviction of
felony.

(b) *Slater v. Swan*, 2 Str. 872.

(c) *Anon. Com. Rep.* 273.

(d) 3 Burr. 1353.

(e) *Bird v. Randall*, 3 Burr. 1345. S. C. Bl. 373, 387. But *qu.* whether this ought not to have been pleaded, *vide supra*, Vol. I. p. 207, and 1 Stra. 701; *infra*, tit. *Debt*.

(f) *Vooght v. Winch*, 2 B. & A. 662, *supra*, Vol. I. p. 207.

(g) But *Ld. Kenyon* held that the plaintiff might recover against the defendant for preventing him from carrying on a foreign trade, although he had not conformed to the law of the country. *Turleton v. M^r Gaseley*, *Peake's C.* 285.

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admission to the benefit of clergy or of the statute. Provisions nearly similar are made by the stat. 15 Geo. II. c. 28, s. 9, in case of a conviction for uttering counterfeit coin (i).

By the stat. 6 Geo. I. c. 23, s. 6, a transcript of the indictment, conviction, and order for transportation of a felon, certified by a clerk of assize or of peace, is evidence, under an indictment against a felon ordered to be transported, for being at large before the expiration of his term.

So in some other cases, which will be noticed in their proper places, certificates by authorized officers are admissible in evidence; so also are certificates, in some instances, by public notaries (k) (1). In other instances, where the certificate is not made by an accredited agent of the law, to whom authority is delegated for the purpose, such as a chirographer (l), the general rule is, that his statement or certificate of a fact is inadmissible (m) (2). The certificate of a British vice-consul abroad is not evidence to prove

(i) See tit. *Coin*.

(k) See *Bills of Exchange*.

(l) See Vol. I p. 173.

(m) Vol. I. p. 79. 154. 173.

(1) [The mere certificate of a notary, that a release was acknowledged by the party to be his act and deed, is not evidence in Virginia. *Kidd v. Alexander*, 1 Randolph, 456. In Massachusetts, such certificate of a justice of the peace, made on a deed, is constantly received in evidence, without further proof.

A notarial certificate is not evidence that a person was preparing to leave the country. *Foster v. Davis*, 1 Littell's Rep. 71.]

(2) [A certificate of a clerk in chancery in Holland, in return of a commission, stating that a list of names was signed by "the late directors of the Spiel house," in his presence, was ruled to be inadmissible, the testimony not having been taken on oath, and the report not being official. *Jones v. Ross*, 2 Dallas, 143. A certificate of the Collector General of the customs at Havanna, under his seal of office, stating that a cargo insured was decreed by the Intendant to be sold, is not good evidence—as it relates to the transactions of another tribunal, which are presumed to be in writing. *Wood v. Pleasants*, Circuit Court, April, 1813, Wharton's Digest, 231.

See, as to admissibility of certificates of land officers, &c. in Pennsylvania, and other states—*Cluggage v. Swan*, 4 Binney, 150. *Lessee of Brown v. Galloway*, 1 Peter's Rep. 291. *Morris's Lessee v. Vanderen*, 1 Dallas, 64. *Garwood v. Dennis*, 4 Binney, 314. *Penn's Lessee v. Hartman*, 2 Dallas, 230. *Lessee of Todd v. Ockerman & al.* 1 Yeates, 295. *Master's Lessee v. Shute*, 2 Dallas, 81. *Neilson v. Mott*, 2 Binney, 301. *Thornton v. Edwards*, 1 Har. & M'Hen. 158. *Seward v. Hicks*, ibid. 22. *Ayres v. Stewart*, 1 Overton's Rep. 221. *Governor v. Jeffreys*, 1 Hawks, 207. *Rochell v. Holmes*, 2 Bay, 487.]

any fact, even such as the amount of a sale, although he is by the law of the country where he resides, constituted *the general agent for absent owners of goods, and was obliged to make the sale in question (*m*) (1). The certificate of the secretary at war relating to the office of a serjeant in the army, has, it seems, been admitted in evidence (*n*), but this decision does not appear to be founded in principle (2).

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In general, where the certificate is in the nature of an adjudication by a court of competent jurisdiction, it is receivable in evidence, when properly authenticated, of the fact itself. As for instance, a certificate by commissioners appointed by a statute to inquire into and state the debts of the army (*o*); or a record by a magistrate of a forcible entry, and detainer (*p*).

The certificate of a bishop in a case of bastardy or marriage, when entered of record, is in general conclusive upon the fact (*q*); but this is a regular legal adjudication upon the fact by a competent tribunal. It has in one instance, it seems, been held, that a certificate under the seal of a minister resident abroad, that a particular marriage was solemnized by him (*r*) was admissible; but this was when the rules of evidence were in a crude and unsettled state (*s*). Even the King himself, it has been held, cannot give evidence in a cause by letters under his sign manual (*t*). (3).

(*m*) *Waldron v. Coombe*, 3 Taunt. 162; *Roberts v. Eddington*, 4 Esp. C. 88.

(*n*) *Lloyd v. Woodfall*, 1 Bl. R. 29.

(*o*) Str. 481, *supra*, Vol. I. p. 211.

(*p*) See the stat. 15 Rich. II. c. 2. 8 Hen. VI. c. 9, s. 2. Burn's J. tit. *Forcible Entry & Detainer*. 2 Rol. R. 39. Dalt. c. 44.

(*q*) See tit. *Bastardy*, *supra*, 217; and tit. *Marriage*, *infra*.

(*r*) *Alsop v. Bowtrell*, Cro. J. 541.

(*s*) See Willes's R. 549, where the decision is questioned.

(*t*) 2 Roll. Ab. 686; and per Willes, C. J. in *Omichund v. Barker*,

(1) [A certificate of a consul of the U. States abroad, is not evidence that a person was preparing to return to the U. States. *Foster v. Davis*, 1 Littell's Rep. 71. The certificate of an American consul at a foreign port, where a vessel was forced in by stress of weather, that the ship's papers were lodged with him, is evidence of that fact, but of no other. *U. States v. Mitchell*, Circuit Court, Jan. 1811. Wharton's Digest, 231.]

(2) [See *Wickliffe v. Hill*, 3 Littell's Rep. 330, cited ante, Vol. I. p. 181, note (1).]

(3) [The certificate of the governor of a West India island, stating that the defendant had applied for leave to take away his car-

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Where a parish has pleaded guilty to an indictment *for not repairing a highway, a certificate, signed by two magistrates, is received as evidence by the Court, to advise them to discharge the defendants; and the practice is of ancient date (*u*). It does not however appear, that such certificates have been used as evidence before a Jury. So the Courts, in some instances, receive certificates from other Courts as to particular laws and customs. The customs of the city of London are ascertained by the Courts at Westminster by means of a certificate by the Recorder of London (*x*). So, certificates are received from the Courts in Wales as to their practice (*y*).

It has been held that a certificate of the discharge of an insolvent debtor under the stat. 2 Geo. II. c. 20, is admissible to prove the discharge (*z*).

CHARACTER.

HERE may be considered the proof,—

- 1st. Of the moral character and conduct of a person in society.
- 2ndly. Of an allegation that a party holds an office, or fills a particular situation.

Moral character in society.

There are three classes of cases on which the moral character and conduct of a person in society may be used in proof before a Jury, each resting upon peculiar and distinct grounds.

- * 365 * Such evidence is admissible.—1st. To afford a *presumption* that a particular party has or has not been guilty of a criminal act. 2ndly. To affect the *damages* in particular

Willes's R. 550; notwithstanding the case of *Abignye v. Clifton*, Hob. 213, *contra*; vide Vol. I. p. 94. 3 Woodeson, Lecture 53. Com. Dig. Testmoigne. 1 Parl. Hist. 43.

(*u*) Per Ashhurst, J. in *R. v. Mawbey*, 6 T. R. 635. 2 Roll. R. 412. *Leyton's case*, Cro. Car. 584. *Randall's case*, 1 Keb. 256. 2 Keb. 221. T. Raym. 215. 1 Salk. 358. 1 Str. 688. [3 Salk. 183.]

(*x*) 1 Burr. 251.

(*y*) Cro. Eliz. 503. [See ante, Vol. I. p. 401, note (*b*).]

(*z*) *Gillam v. Stirrup*, C. T. Hardw. 145. This statute has expired. *Qu.* as to the provisions of the statute. It seems that such a certificate would not be evidence, unless it was the original entry of the adjudication, or an examined copy of it; or unless it was made evidence by the express provisions of the statute.

go, to save the penalty of an embargo bond, and which permission he had refused, was allowed to be given in evidence. *U. States v. Mitchell*, Circuit Court, Jan. 1811. Wharton's Digest, 230. 231.]

cases, where their amount depends upon the character and conduct of any individual ; and, 3rdly. To impeach or confirm the *veracity* of a witness.

Evidence of the character which a person bears in society is in many instances admissible, as affording a presumption that he did or did not commit a particular act.

Where the guilt of an accused party is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general character, since it is not probable that a person of known probity or humanity would commit a dishonest or outrageous act in the particular instance. Such presumptions are, however, so remote from the fact, and it is frequently so difficult to estimate a person's real character, that they are entitled to little weight, except in doubtful cases (1). Since the law considers a presumption of this nature to be admissible, it is in principle admissible wherever a reasonable presumption arises from it, as to the fact in question ; in practice it is admitted wherever the character of the party is involved in the issue.

Presumptive
evidence of
innocence.

Formerly, evidence of the defendant's good character, in criminal proceedings, was admitted in capital cases only (a), and that in *favorem vite*, but such evidence is now admissible in all cases of misdemeanors, where the character of the defendant is in jeopardy (b).

When evi-
dence in cri-
minal cases.

Upon indictments for larceny, or fraud of any description, the general character of the defendant for * honesty * is admissible ; and where the indictment charges upon the defendant any violence committed against the person of an individual, or against the public peace, evidence may be adduced by him of his general character for humanity and peaceable conduct. Such evidence is also admissible upon an indictment for a libel (c).

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Presumptive
evidence of
innocence.

It is a general rule, that evidence must be given of the general character of the party, and not of particular acts (d),

Usual ques-
tions.

(a) 2 St. Tr. 1038. *R. v. Carr*, 32 Geo. II.

(b) *R. v. Harris*, 2 St. Tr. 1038. *Attorney General v. Bowman*, 2 B. & P. 532, a. [*Commonwealth v. Hardy*, 2 Mass. Rep. 317.]

(c) *R. v. Harris*, 2 St. Tr. 1038. Evidence of character is not admissible upon the trial of an information by the Attorney General in the Exchequer, to recover a penalty. *Attorney General v. Bowman*. Sittings at Westminster, 16th June, 1791. Cor. Eyre, C. B. 2 B. & P. 532.

(d) 1 T. R. 754.

(1) [*The State v. Wells*, 1 Cox's Rep. 424.]

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for the presumption in favour of the prisoner arises from the general uniform tenour of his conduct, and not from particular isolated facts. The questions usually put for this purpose are, how long the witness has known the prisoner, and what his general character has been for honesty, humanity or loyalty, (according to the nature of the charge) during that period.

A prosecutor cannot impeach the character of a defendant until the latter has adduced evidence to support it (*e*); and although such evidence is warranted in principle, it is not resorted to in practice; he may cross-examine the witnesses as to the grounds of their belief, and as to particular facts, and may bring evidence in contradiction to impeach the general character of the defendant (*f*).

Civil proceedings.

In civil proceedings, unless the character of a party be put directly in issue by the nature of the proceeding, evidence of his character is not in general admissible (1).

* 367 Upon an ejectment brought by an heir at law to set aside the will, for fraud committed by the defendant, * evidence of the defendant's good character was rejected as inadmissible (*g*). And even upon an information to recover a penalty from the defendant for keeping false weights, such evidence was rejected, because the prosecution was not directly for the crime, but to recover a penalty. The principle of this distinction is not very intelligible; the good character of the defendant in a prosecution for keeping false weights can be admitted upon no ground, except

(*e*) B. N. P. 296. In the case of barrettry, the prosecutor may examine as to particular facts, for otherwise the case cannot be proved; but then particular notice is requisite as to the facts to be proved. Vin. Ab. Evidence, M. a. 1. 6. Per Page, J.

(*f*) 2 Atk. 339, *Clark v. Periam*.

(*g*) *Goodright v. Hicks*, B. N. P. 294.

(1) [In trespass, assault and battery, the plaintiff ought not to be permitted to give evidence of his general character. *Givens v. Bradley*, 3 Bibb, 195. In assumpsit for money had and received, the defendant cannot give evidence of his general character, though he is incidentally charged by the evidence with committing a particular fraud. *Nash v. Gilkeson*, 5 Serg. & Rawle, 352. The plea of probable cause to an action for malicious prosecution, does not put the plaintiff's general character in issue. *Gregory v. Thomas*, 2 Bibb, 286. Where the character of the party is not immediately in issue, yet if he introduce evidence in support of it, the opposite party may rebut the evidence by impeaching his general character. *Grunnis v. Branden*, 5 Day, 260.

+ Evidence of general character, derived from the common report of the neighbourhood, is admissible. *Kimmel v. Kimmel*, 3 Serg. & Rawle, 336. See also *Boynton v. Kellogg*, 3 Mass. Rep. 192. *Foulkes v. Sellway*, 3 Esp. C. 236.]

that it affords a presumption that the fact imputed has not been committed, and this is the very fact which is in issue in the former case. The effect of the distinction is, to make the admissibility of evidence to prove a fact to depend, not upon its tendency to prove it, but upon the consequences which result from the fact when proved.

In civil proceedings.

In an action of slander, imputing dishonesty to the plaintiff, the plaintiff may, it seems, adduce evidence of general good character, even before any evidence to the contrary has been given on the other side, although no justification be pleaded (*h*).

The principle of this decision appears to be very dubious. Evidence of the character of a party when admissible, must be so, either upon the ground that it furnishes a presumption that the party has not been guilty of a criminal act imputed to him. or, as will be seen, with a view to damages. But where the defendant does not justify the slander, presumptions of innocence are out of the question; the defendant by his plea admits that the imputation was false, and therefore in strictness, the character of the plaintiff is not involved in the issue, in other words, the presumption to be derived from character tends only to prove what is already conceded. Where indeed the defendant justifies the slander which conveys an imputation of *dishonesty, the case may admit of a very different con- * 368 sideration, for there the party is charged with a crime, and in such a case, character affords just the same presumption of innocence as if the party had been tried for the offence. And next, although, as will be seen, a defendant may in some instances impeach the plaintiff's character, or even that of a third person, in order to mitigate the damages, and where he does so, it is clear that the plaintiff may, on the other hand, prove the goodness of his character, yet, in general, a plaintiff is not allowed to adduce such evidence in the first instance (*i*); such evidence is unnecessary till the character has been impeached, for the law presumes a person's character to be good till the contrary be proved.

The character of *third persons* is also in some instances admissible, as affording a presumption with respect to the disputed fact.

Upon the question of illegitimacy, it has been held, that after probable evidence of non access has been adduced, evidence may be given that the mother was a woman of

(*h*) *King v. Waring*, 5 Esp. C. 13.

(*i*) *Dodd v. Norris*, 3 Camp. 519. *Banfield v. Massey*, 1 Camp. 460.

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bad character (*k*). So upon an indictment for a rape, or for an attempt to commit a rape, general evidence is admissible to impeach the character of the woman for chastity and decency (*l*). And in such a case evidence is admissible that the woman has formerly been connected with the prisoner, although it cannot be shown that she has been criminally connected with other persons (*m*).

- * 369 General evidence to impeach the character of a prosecutrix * for chastity, is admissible upon an indictment for a rape, (1) or for an assault to commit a rape, although she has been examined as a witness, and has not been asked questions on cross-examination tending to impeach her character for chastity (*n*).

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2dly. In some instances evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad character for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant (*o*) (2). So in actions for slander and libel, where the defendant has not justified, evidence of the plaintiff's bad character has also been admitted (*q*) (3).

(*k*) *Pendrell v. Pendrell*, Str. 925.

(*l*) *Hodgson's case*; by a majority of the Judges on a case reserved, 1812; and Cor. Wood, B. York Summer Assizes, 1812. And see 2 Starkie's C. 241.

(*m*) Ibid.

(*n*) *R. v. Clarke*, 2 Starkie's C. 241. The prosecutrix is not bound to answer the question whether she has had connection with other men. 3 Camp. 519.

(*o*) B. N. P. 27. 296. *Coote v. Berty*, 12 Mod. 232. See *Foulkes v. Sellway*, 3 Esp. 236. *Roberts v. Mulston*, Sel. N. P. 25. [See *Ligon v. Ford*, 5 Munf. 10.]

(*q*) *Ld. Leicester v. Walter*, 2 Camp. 251. 1 M. & S. 284. *Rodriguez v. Tadmire*, 2 Esp. C. 720.

(1) [Such evidence was admitted in *The Commonwealth v. Murphy*, though it does not so appear in the case, as reported, 14 Mass. Rep. 387.]

(2) [In an action by a woman for a breach of promise of marriage, and for seduction, the defendant shall not be permitted to give in evidence, in mitigation of damages, the general bad reputation of the plaintiff, as to chastity, which she acquired after the seduction. *Boynton v. Kellogg*, 3 Mass. Rep. 189. But see *Johnson v. Caulkins*, 1 Johns. Cas. 116. *Woodward v. Bellamy*, 2 Root, 354.

(3) [Evidence of the plaintiff's general bad character is admissi-

The grounds of admitting such evidence is, that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished (r). Where however the defendant justifies the slander, it seems to be doubtful whether evidence of reports as to the conduct and character of the plaintiff can be received (s) (1).

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(r) — v. *Moor*, 1 M. & S. 284. See *Snowden v. Davis*, 1 M. & S. 286 n.; and tit. *Libel & Slander*. *King v. Francis*, 3 Esp. C. 116. And see tit. *Damages—Trespass*; and *Watson v. Christie*, 2 B. & P. 224.

(s) In the case of *Snowdon v. Smith*, (Devon Lent Ass. 1811,) *Chambre, J.* rejected such evidence; and the case of the *Earl of Leicester v. Walter* being cited, said that it did not govern a case like the present, where the defendant justified. See 1 M. & S. 286, note (a). But in the subsequent case of *Kirkman v. Oxley*, (cited *Phillips*, 189,) *Heath, J.* in an action for slander imputing larceny, allowed the defendant, who had justified, to go into evidence of the plaintiff's bad character in mitigation of damages. The latter decision appears to be better founded in principle, from this consideration: if the issue on the justification, and the question as to the quantum of damages, were to be tried separately, such evidence would clearly be admissible on behalf of the defendant after the issue on the plea of justification had been decided against him; and if so, it is difficult to say that such evidence can be rejected, although both questions are tried together; for although the defendant gives evidence tending to prove his justification, he is still entitled to give evidence in reduction of damages, in case the jury decide against him on the justification. It would be for the Court, in such a case, to advise the jury to apply such evidence to the reduction of damages only, and not to consider it as subsidiary to the proof of the justification.

ble in mitigation of damages, in an action for slander. *Sawyer v. Eifert*, 2 Nott & McCord, 511. *Buford v. M'Luny*, 1 Nott & McCord, 268. But evidence of a particular crime, of a nature different from that with which he is charged, is inadmissible. *Sawyer v. Eifert*, ubi sup. *Andrews v. Vanduzor*, 11 Johns. 38. *Seymour v. Merrills*, 1 Root, 459.

In *Foot v. Tracy*, 1 Johns. 46, the court of New-York was divided on the question whether in an action for a libel, the defendant might give in evidence, under the general issue, the general character of the defendant, in mitigation of damages.

(1) [In the case of *Larned v. Buffinton*, 3 Mass. Rep. 553, *Parsons, C. J.* says, "when through the fault of the plaintiff, the defendant, as well at the time of speaking the words, as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff, to mitigate damages." But in *Alderman v. French*, 1 Pick. 19, *Jackson J.* says, "we do not find this dictum supported by any authority; and think whenever such evidence is admitted, it will be when the defendant, instead of making it a ground of defence under the pretence of mitigating the damages, will admit that he was mistaken, and thus afford all the relief he can against the calumny he has published."]

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* And in an action for a malicious prosecution on a charge of felony, it was held, that a witness could not be asked on cross examination whether the plaintiff's house had not been searched on a former occasion, and whether he was not a person of suspicious character, in order to prove that there was probable cause for the charge; for in an action of slander, such proof is given to mitigate the damages, and not to bar the action; and such evidence affords no proof of probable cause (t).

But it seems, that in general a *plaintiff* cannot go into evidence of good character to increase the damages, until evidence has been given to impeach it (1). The plaintiff in an action for adultery with his wife, or for the seduction of his daughter, cannot give evidence of the good character of the one or the other, until the defendant has given evidence to impeach it (u), for till the contrary appear, their previous characters are presumed to be good, and that presumption is very forcibly confirmed by the consideration that the defendant * is at liberty, if there be ground for it, to impeach the character by evidence.

It has even been held, that where the defendant has attempted to impeach the plaintiff's character on cross-examination of his witnesses, and has palpably failed, the plaintiff cannot call witnesses to his own good character (x). It may be doubted whether this is not carrying the general rule too far; such evidence is in general inadmissible, because the law presumes that the party's conduct has been correct and proper, a presumption which is strongly confirmed by the silence of the adversary upon the subject; but where he attempts to impeach the character of the party by evidence, the presumption from acquiescence ceases. Besides, although the witnesses deny the facts, it is very possible that the insinuation conveyed by the questions, and the mode of answering them, may have produced an effect upon the Jury which ought to be removed.

It has been held in one instance, that in an action for the seduction of a daughter, evidence on the part of the defendant, in mitigation of damages, that the daughter

(t) *Newsam v. Carr*, Cor. Wood, B. 2 Starkie's C. 69.

(u) *Bamfield v. Massey*, 1 Camp. 460. 3 Camp. 519. [*Wallace v. Clark*, 2 Overton's Rep. 93.]

(x) *King v. Francis*, 3 Esp. C. 116, Cor. Ld. Kenyon.

(1) [*Ketland v. Bisset*, Circuit Court, Oct. 1804. Wharton's Digest, 251. acc. But in an action for a libel, with a plea of justification, the plaintiff may give evidence of his character, before it is attacked by the defendant. *Romayne v. Duane*, Circuit Court, April 1814. *ibid.* See *Grunnis v. Branden*, cited ante p. 366, note (1).]

had previously had a child by another man, did not warrant the admission of general evidence of good conduct (y), but that the plaintiff was confined to evidence to disprove the specific breach of chastity. And yet it should seem, upon principle, that as the fact was offered in evidence by the defendant, in order to diminish the value of that which the plaintiff had lost, and to show that the injury to his feelings and his comforts was less than might otherwise have been presumed, evidence was admissible on the other hand to show that the subsequent conduct of the daughter * had been correct, and to prove in fact what degree of * 372 injury had been sustained.

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In the subsequent case of *Dodd v. Norris* (a), where the daughter was cross-examined, in order to show that in her intercourse with the defendant she had been guilty of great indelicacy and levity, evidence of good character was held to be inadmissible, no evidence of bad character having been given by the defendant. This case it is to be remarked, differs essentially from the former, inasmuch as no evidence was given to impeach the daughter's character, and consequently to diminish the damages, except so far as it arose out of the very transaction itself; and if that were to be a sufficient ground for the admission of such evidence, it would be admissible in every such action, since the very nature of the action involves improper conduct on the part of the wife or daughter.

3rdly. Evidence offered to impeach the character of a witness will be subsequently considered (b).

In order to prove a *general* allegation that a party holds a particular office or situation, it is usually sufficient to prove his acting in that capacity.

Special character or office.

In the case of all peace-officers, justices of the peace, and constables, it is sufficient to prove that they acted in those capacities, even upon an indictment for murder (c). And prior to the statute 11 Geo. II. c. 30, s. 32, which directs, that excise and custom-house officers acting in the execution of their duty, shall be taken to be such till the contrary appears, evidence was admitted, both in criminal and civil proceedings, to show that they were reputed offi-

(y) *Bamfield v. Massey*, 1 Camp. 460. See *Dodd v. Norris*, 3 Camp. 519.

(a) 3 Camp. 519.

(b) See tit. *Witness*.

(c) Per Buller, *J. Berryman v. Wise*, 4 T. R. 366. *Gordon's case*, Leach, 581. *R. v. Shelley*, Leach, 381, (n). [*Potter v. Luther*, 3 Johns. 431.]

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actual passing of the money (*l*). Under the same statute it is unnecessary, in order to satisfy the allegation that the money was milled-money, to show that the money was actually milled, that is, that it was passed through a mill or press to be formed into a plate of proper thickness, to be cut into pieces for stamping, it is sufficient, if the money resemble genuine milled-money, all money being now milled and not hammered (*m*).

In order to show the guilty knowledge of the defendant, evidence is admissible that the defendant uttered other base coin (*n*) to other persons on the same day, or perhaps on other days near the time of committing the offence. And this, upon the general principle that the conduct of a prisoner is admissible in evidence to prove a guilty knowledge. In such cases, * indeed, where the intention does not appear from the transaction itself, it must be inferred from other facts and circumstances. Such previous utterings are therefore evidence, although they may be in themselves substantive offences. The whole demeanor of the prisoner may afford pregnant evidence of his mind and intention; for it is a general rule, that where crimes intermix, and one is evidence to prove another, the Court must go through the whole detail.

In one instance, where a man committed three burglaries on the same night, which were all connected, the prisoner having left at one place property which he stole at another, evidence was given as to all three (*o*). There must however, in such cases, be such a connection as to warrant the inference of knowledge in the principal case. This may arise, in the case of uttering, from proximity of time, but the more detached in point of time the previous utterings are, the less relation will they bear to that stated in the indictment. The fact that all the money uttered is from the same die, or in the case of uttering forged notes, that they

(*l*) *Woolridge's case*, E. P. C. 179. Leach, 251. The prisoner there had brought the coin to the house of the intended buyer, to be sold at a certain rate, and had laid them down upon the table for the buyer to count them out, and she had counted part, when the officers entered and apprehended them, before the buyer could pay for those selected; and it was held that the offence had not been completed.

(*m*) *R. v. Bunning*, Leach, 708. East's P. C. 183. *R. v. Dorrington*, & *R. v. Lazarus*, *Ibid*.

(*n*) See *R. v. Wylie*, 1 N. R. 92. *R. v. Tattersall*, cited 1 N. R. 93. See tit. *Knowledge*.

(*o*) Cited by Ld. Ellenborough, *R. v. Wylie*, 1 N. R. 94. Upon an indictment for robbery in extorting money by threats, subsequent attempts are evidence to prove the *quo animo*. *Donally's case*.

are all impressions from the same plate, is important to connect the utterings, and to indicate a guilty knowledge. The circumstance that the prisoner at the time of uttering had other counterfeit coin, (especially if it be of the same description with that uttered,) is also evidence for the same purpose (*p*), although not alleged in the indictment. It is however to be observed, that to make such circumstances evidence, there must be a strong connection in the subject matter.

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Upon an indictment for forging and uttering a bill of exchange, it was held that the prosecutor was not at liberty to prove that a bank-note which was found * in the pocket * 380 of the prisoner was forged (*q*); other indications of guilty knowledge and intention, such as the taking precautions to prevent a quantity of base coin from being injured by rubbing, and the possession of powder or pith used to give to the base coin the usual appearance of coin which has been in circulation, are too obvious to require remark.

The information and proceedings before the magistrate are deemed the commencement of the suit under the 9th section of the stat. 8 & 9 Will. III. c. 26, s. 6, and should be produced (*r*), although the indictment be for colouring, and the commitment be for counterfeiting, if the time be material.

In order to oust the prisoner of his clergy under the stat. 15 Geo. II. c. 28, s. 23, the record of the former conviction must be proved (*s*). And where the second conviction is in a different county or city, it is sufficient under the 9th section of that statute to produce a transcript containing the effect and tenor of the former conviction made by the clerk of the assize, or clerk of the peace of the county or city where the first conviction was had.

And by the stat. 37 Geo. III. c. 126, s. 5, such a transcript of conviction so certified, (in case of uttering coin not current here), shall be evidence of such conviction in any other county, city, or place.

COLLATERAL FACTS.

It has been seen, that all facts and circumstances are admissible in evidence which are in their nature capable of affording a reasonable presumption or inference

Collateral
facts.

(*p*) Per Thompson, B. 1 N. R. 95.

(*q*) By Bayley, J. Lancaster Summ. Ass. 1820.

(*r*) East's P. C. 168. *R. v. Wallace*:

(*s*) *R. v. Rothwell*, Add. Pen. St. 122.

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as to the disputed fact (*t*); and that on the other hand, remote and collateral facts, from which no fair and * reasonable inference can be drawn, are inadmissible, for they are at best useless, and may be mischievous because they tend to abstract the attention of the Jury, and frequently to prejudice and mislead them (*u*). It seems to be the province of the Judge in the exercise of a sound discretion, to discriminate between such facts as are connected with the issue, and such as are merely collateral.

It is frequently difficult to ascertain *a priori*, whether proof of a particular fact offered in evidence will or will not become material, and in such cases it is usual in practice for the Court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material.

The following are instances where the facts have been held to be insufficient to afford any inference as to the fact in dispute.

The time at which one tenant pays his rent is not evidence to show at what time another tenant pays his rent (*x*).

A custom in one parish, archdeaconry or manor, is no evidence of the same custom in another (*y*). For in these and other such cases there is no such connection between the fact and the issue as to afford a reasonable inference from the one to the other. Where, on the other hand, such facts are by any general link connected with the issue, they become evidence. Thus, where all the manors within a particular district are held under the same tenure, and the issue is upon some incident to that tenure, the custom of one manor * is evidence to prove that the same custom exists in another (*z*).

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Where the issue is as to a particular right upon a common, evidence is inadmissible of the existence of such right on an adjoining piece of common, unless a connection between them be proved, and the right be claimed on both (*a*).

(*t*) Vol. I. p. 17 & 39.

(*u*) Nothing is inadmissible which is material to the issue joined, to prove or disprove it (per Blackstone, J. 2 Bl. Rep. 1169). No new matter foreign to the issue joined is admissible in evidence. Per De Grey, J. 2 Bl. Rep. 1169. And *vide* Vol. I. p. 40, sec. xxii.

(*x*) *Carter v. Pryke*, Peake's C. 95.

(*y*) Cowp. 808. *Ruding v. Newell*, Str. 957. 601. 662. Fort. 41. Doug. 495. Unless the custom be general.

(*z*) Str. 654. *Duke of Somerset v. France*, 3 Keb. 90. Fort. 41. 44. Doug. 495. Cowp. 808.

(*a*) 4 T. R. 157, *Morewood v. Wood*.

Where the question is one of skill and judgment, evidence may be given of other facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with and tend to elucidate the issue (*b*).

Collateral facts.

A collateral fact is not in general evidence to discredit a witness (*c*). But where a witness swore that a party had acknowledged two instruments to have been made by him, evidence was admitted that one of them was forged (*d*). So evidence of character is in many instances admissible (*e*). So collateral facts are admissible to prove intention, malice, or guilty knowledge (*f*).

In an action for a malicious prosecution, a publication by the defendant, on the subject of the prosecution, is evidence to prove the malice. So although acts done subsequent to a contract cannot alter the nature of the contract, they may be adduced to show what the contract was, if it be doubtful (*g*); therefore, an admission of a debt by the acceptance of bills of exchange by partners, in payment of goods sold, is * evidence to show the fact of * 383 a sale to the partners (*h*). So where the meaning of the terms of an agreement is doubtful, and depends on custom or usage, collateral evidence is admissible to explain them (*i*). So, collateral evidence is admissible to show the probability of a surrender by a tenant for life, where the possession has long accompanied the recovery (*k*).

In order to prove that the acceptor of a bill of exchange knew the payee to be a fictitious person, evidence is admissible to show that the acceptor had accepted similar bills before they could, according to their date, have arrived from the place of date (*l*). And similar evidence is admissible to prove that the indorsee had a general authority from the acceptor to fill up bills with the name of a fictitious payee (*m*).

(*b*) *The Wells Harbour* case, M. 23 Geo. III. MS. 87.

(*c*) See Vol. I. p. 146; and *R. v. Watson*, 2 Starkie's R.

(*d*) Rep. Temp. Hardw. 311.

(*e*) See tit. *Character*.

(*f*) See tit. *Coin*.

(*g*) *Saville v. Robertson*, 4 T. R. 720.

(*h*) 4 T. R. 720.

(*i*) See tit. *Custom*. 1 Starkie's C. 210, *Birch v. Depeyster*, 4 Camp. 385. S. C.

(*k*) See 2 Saund. 42, note (7).

(*l*) 2 H. B. 288.

(*m*) Ibid.

COMMON.

COMMON, or right of common, is an incorporeal hereditament which consists in a profit which a man has in the lands of another.

Common is chiefly of four sorts, of pasture, piscary, turbary, and estovers (*n*).

Common of pasture, is a right of feeding one's beasts in another's land, and it is either appendant, appurtenant, or in gross (*o*).

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Appendant. * Common appendant is of common right (*p*), and it may be claimed in pleading as *appendant*, without laying a prescription. But appendancy *implies* a prescription (*q*). It cannot be claimed, except in the lord's wastes (*r*), for the claimant's *own* commonable cattle, *levant* and *couchant*, upon the land (*s*).

Appurtenant. Rights of common appurtenant to the claimant's land are altogether independent of tenure; they may be claimed in *other lordships*; and for cattle not commonable, may be claimed by *grant* as well as by *prescription*, and either

(*n*) Finch's L. 157. Co. Litt. 122. 2 Inst. 86. 2 Bl. Com. 32.

(*o*) Co. Litt. 122. 2 Bl. Com. 33. Common *pur cause* of vicinage is not strictly a right of common. It happens where the inhabitants of contiguous townships have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields without any molestation from either. It is a permissive right, intended to excuse what is, in strictness, a trespass in both, and to prevent a multiplicity of suits. 2 Bl. Com. 33. *Musgrove v. Cave*, Willes, 322.

(*p*) See 2 Inst. 86. 2 Bl. Com. 33. When the lords of manors originally granted out parcels of land to tenants, the latter could not plough or manure the land without beasts; the beasts could not be sustained without pasture; and pasture could not be had but in the lands, wastes, and in the fallow lands of other tenants; and therefore the law annexed the right of common as inseparably incident to a grant of the lands for commonable cattle, i. e. beasts of the plough, or such as manure the ground. 2 Bl. Com. 33.

(*q*) Hargrave's note, 2 Inst. 122, *a. n.*

(*r*) 2 Inst. 85. 1 Rol. 396. 4 Co. 37.

(*s*) Ibid. and 1 Burr. 320. A right of common is extinguished by unity of possession. A grant of land, &c. with common appurtenant, does not pass a right of common after the extinction by unity of possession, although those who have occupied the tenement since the extinction have used the common. *Secus*, if there had been a grant of all commons used therewith. *Clements v. Lambert*, 1 Taunt. 205. See also *Morris v. Edgington*, 3 Taunt. 24. Post, 1677.

for cattle *levant* and *couchant*, or for a stinted number not *levant* and *couchant* (t).

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Common in gross may also be claimed by either grant or prescription.

In gross.

Since all these rights depend either upon a *prescription* or a *grant* (u) actually proved or presumed, much of the evidence on this subject is referrible to the more general heads of evidence of *grants* and *prescriptions*. It is obvious, that unless a grant can be expressly proved, such rights must in general be supported * by evidence of * 385 usage (x). No such right of common appendant exists but for such cattle as are *levant* and *couchant* (y). So many are *levant* and *couchant* as the *land*, to which the common is appurtenant, will maintain in winter (z); and common cannot be claimed as appendant to a house without any curtilage or land (a). And therefore, where a plaintiff in an action for the disturbance of his right of common, claimed the right for all commonable cattle *levant* and *couchant*, and it appeared that the house of which he was the owner had neither land, curtilage, nor stable, belonging to it, the plaintiff was nonsuited (b). And therefore, although the declaration, or plea of justification, allege the right of common to be appendant to a *messuage*, it must be proved that there is at least a curtilage belonging to it, on which the cattle may be *levant* and *couchant* (c).

Levancy and couchancy.

Where the declaration in an action for disturbance of the plaintiff's right of common alleged that he was possessed of a *messuage* and land, with the appurtenances, and by reason thereof ought to have common of pasture, it was held that he was entitled to recover *pro tanto*, although it appeared that he was possessed of land only (d).

(t) 4 Burr. 2431. 1 Rol. 401, l. 15. Cro. Jac. 27. 2 Mod. 185.

(u) Cro. Car. 482. F. N. B. 180. Bac. Ab. Common, A. 2.

(x) See 12 Vin. Ab. T. b. 18, pl. 3. Litt. R. 295.

(y) Bac. Ab. Common, A. 2.

(z) Per Coke, J. Noy, 30. 1 Vent. 54. 5 T. R. 46. *Shakespear v. Peppin*, 6 T. R. 741.

(a) *Scholes v. Hargreaves*, 5 T. R. 46; and per Buller, J. Ibid. The cases, 1 Salk. 169. 2 Brownl. 101. *Emerton v. Selby*, 2 Ld. Raym. 1015. Noy, 30, are consistent with this doctrine, for in all of them the Courts say that they will intend that *messuage* or *cottage* includes land.

(b) *Scholes v. Hargreaves*, 5 T. R. 46, by Ld. Kenyon, C. J.; and the Court of K. B. afterwards approved of the nonsuit.

(c) Sir W. Jones, 227.

(d) *Rickets v. Salwey*, 2 B. & A. 360.

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IV.Levancy and
couchancy.

* But in order to prove that the cattle in question are *levant* and *couchant*, it must be proved that they are connected with the land on which they are so alleged to be *levant* and *couchant* (e). In the case of a distress, those cattle only are said to be *levant* and *couchant* which have been there for a space of time long enough for them to have lain down and risen up again. But in a case of right of common appendant, *levancy* and *couchancy* is merely a mode of ascertaining the number of cattle which are entitled to the right of common (f).

The plaintiff alleged a right of common of pasture for all commonable cattle *levant* and *couchant* on 100 acres of land in the plaintiff's possession, part of a certain common field over the said common field when sown with corn, after the corn was reaped, gathered, and carried away, until the said field, or some part thereof, was sown with corn. It was held to be supported by proof that the plaintiff was a part-owner, with the defendant and others, of a common field upon which, as stated in the allegation, the occupiers turned their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon the land during winter, and although the number was in proportion to the extent, and not the produce, of the land in respect of which the right was claimed (g). It must also be proved that the cattle are the party's own cattle, or at least that he has a special property in them (h); and, in the case of common appendant, that they are commonable cattle.

* 387 Where the right of common is claimed by an inhabitant * of a particular place in right of inhabitancy, he can claim such only as are *levant* and *couchant* (k).

Disturbance.—
Title,

Although a plaintiff in an action for disturbance of his right of common, whether against a commoner or stranger, may declare upon his possession only (l), (for possession is sufficient against a wrong doer,) he must on the trial prove his right of common (m), such as he has alleged it to be in the declaration (n).

(e) 1 Will. Saund. 346, c. in note.

(f) See the judgment of Bayley, J. *Cheesman v. Hardham*, 1 B. & A. 706.

(g) 1 B. & A. 706.

(h) Bro. Common, 47. 2 Show. 328. 1 Will. Saund. 346, c.

(k) 1 Roll. Ab. 398. 1 Will. Saund. 346, c. (3).

(l) *Saunders v. Williams*, 1 Vent. 319. *Strode v. Birt*, 4 Mod. 418. *Atkinson v. Teasdale*, 2 Bl. R. 817. 3 Wils. 278.

(m) B. N. P. 76. 1 Will. Saund. 346, (z).

(n) Ibid.

Proof of the uninterrupted enjoyment of a common for twenty years will in general, as in the case of other easements, be evidence to raise a legal presumption of a right by prescription, or at least by grant (*o*). An enjoyment for a shorter period may or may not afford such a presumption, according to the circumstances which support or rebut the right (*p*).

If the plaintiff should unnecessarily state his title to the right in the declaration, it seems, that provided he prove a title to the particular right claimed, the variance will not be fatal, for the disturbance is the gist of the action, and the title is mere inducement, and not traversable (*q*). In such an action against a stranger, or against a commoner for depasturing supernumerary cattle, it does not appear to be necessary for the plaintiff to prove that he has sustained any *specific injury*; for the consumption of the grass by the other *cattle is in itself a diminution of the right and profit of the commoner, and considered to be sufficient proof of the damage alleged in the declaration; for if the other cattle had not been there, the plaintiff's cattle might have eaten every blade of grass which was consumed by the other; besides, the law considers that the right of the commoner is injured by the act, and therefore allows him to bring an action for it, to prevent a wrong-doer from gaining a right by repeated acts of encroachment (*r*).

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Proof of damage.

It is said to be a *general rule*, that wherever an act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for the invasion of the right, without proof of the specific injury (*s*); and this has been laid down by a writer of autho-

(*o*) See tit. *Disturbance—Grant—Prescription*. Also 2 Will. Saund. 175, *d.* *Lewis v. Price*, Cor. Wilmot, J. Worcester Spring Ass. 1761. 2 Will. Saund. 175, *a.* *Darwin v. Upton*, Ibid. *Bealy v. Shaw*, 6 East, 214. *Martin v. Goble*, 1 Camp. 323.

(*p*) Per Ld. Ellenborough, *Bealy v. Shaw*, 6 East, 214. The plaintiff being possessed of a house and land in E. uses right of common in the manor of W. for 60 years, the common in W. being adjacent to the common in E. It is a question of fact for the Jury to determine, whether the user be referable to a mistake of the boundary, or to a legal right of common in W. *Hetherington v. Vane*, 4 B. & A. 428.

(*q*) B. N. P. 76. 4 Mod. 424. Yet if the plaintiff should set out an insufficient title, the declaration, it is said, would be bad. 1 Salk. 363. 2 Ld. Raym. 1230.

(*r*) *Wells v. Watling*, 2 Bl. Rep. 1233. *Hodson v. Todd*, 4 T. R. 71.

(*s*) 1 Will. Saund. 346, *a.* in note.

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rity (*t*) to be a governing principle in these cases. As for instance, an action may be maintained for fishing in the plaintiff's several fishery, although it be neither alleged nor proved that the defendant caught any fish (*u*) (1).

But if the defendant be the lord of the manor (*x*), or put his cattle upon the common with the lord's license, the plaintiff must prove a specific injury; and it would be insufficient to show that the cattle consumed the grass, as in an action against a stranger, without also proving that there was not a sufficiency of common left in order to support the action, for the lord is entitled to what remains of the grass, and may either consume it by his own cattle, or license another to depasture it, although in the case of a stranger, it * seems to lie on the defendant to show that a sufficiency of common is left for the plaintiff (*y*).

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Proof under
plea of justifi-
cation.

A plea of justification, claiming a right of common appendant for the defendant's commonable cattle *levant* and *couchant*, may be put in issue by a general replication, for it is but one entire title (*z*), or the plaintiff may specially traverse that they were the cattle of the defendant *levant* and *couchant* (*a*); and in either case the defendant must prove that the cattle are his own, or that he has a special property in them (*b*), for a man has no right to use the common with the cattle of a stranger, or with his own cattle *levant* and *couchant*, upon some other land, and not upon the land to which the right is appendant or appurtenant; but if he borrow cattle to compester his land, they may be put upon the common, for he has a special property in them (*c*). And where a man has common appurtenant for a specific number of cattle as appurtenant, it may be severed by grant and converted into a right of common in gross.

(*t*) Mr. Serj. Williams, 1 Will. Saund. 346, *a*.

(*u*) *Patrick v. Greenway*, Cor. Lawrence, J. Oxford Spring Ass. 1796, cited 1 Will. Saund. 346, *b*.

(*x*) See the observations of Buller, J. in *Hobson v. Todd*, 4 T. R. 73; and *Smith v. Feverell*, 2 Mod. 6; and 1 Will. Saund. 346, *b*. in note.

(*y*) See the form of declaration, Herne, 125. 2 Mod. 6. 1 Lutw. 107. 3 Wils. 290. 1 Will. Saund. 146, *a*. 9 Rep. 113, *a*.

(*z*) Skinn. 137. 2 Show. 328. 1 Burr. 316.

(*a*) Ibid. and *Bennett v. Reeve*, Willes, 227.

(*b*) Bro. Common, 47. 2 Show. 328.

(*c*) *Melliton v. Trevivan*, Skinn. 137. F. N. B. 180. Roll. Common, 402.

(1) [See Angell on Water-courses, 50—53.]

A plea claiming a prescriptive right of common for a certain number of beasts, generally, is not supported by evidence of a right of common of vicinage (*d*).

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Proof of a prescription limited by an exception will not support a general prescription. Thus, proof of a prescription for all cattle, at all times of the year, (sheep only excepted for a certain time), will not support a prescription claimed for all cattle, &c. at all times of the year (*e*).

Variance.

* On issue joined, as to a right of common, the defendant may give in evidence a release of the right of common, although he might have pleaded it (*f*). Such a release however will not avail where the common belongs to land which is entailed, and which cannot pass by release any more than the land itself (*g*).

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Proof on issue
joined on the
right.

Upon issue taken in replevin on a replication by the plaintiff, alleging a prescription for commonable cattle *levant* and *couchant*, and averring that the cattle in question were *levant* and *couchant*, the burthen of proof would lie on the plaintiff. If in such case the cattle have been distrained by a commoner (*h*), the plaintiff will fail, unless he proved some of the cattle to be *levant* and *couchant* (*i*); but he would be entitled to a verdict, the prescription being proved, if any of the cattle were *levant* and *couchant*, although others were not so, for it would come to a question of surcharge. But if the lord had distrained, and on the trial of such issue it appeared that some of the cattle were *levant* and *couchant*, and that others were not, the issue would be found for the lord (*k*); and so it would be in trespass (*l*) for taking the cattle. But if in such a case the

In replevin.

(*d*) 12 Vin. Ab. Common, T. b. 18. L. E. 235, pl. 37. 13 Hen. VII. 13. If the defendant justify under an alleged right of common, and it appear that the common has been inclosed for twenty years, the justification cannot be supported. *Creach v. Wilmot*, 2 Taunt. 160, cited by Lawrence, J.

(*e*) Carth. 241.

(*f*) Clayton, 9, pl. 16. *Atkinson's case*.

(*g*) Ibid.

(*h*) A commoner cannot distrain the surplusage where another commoner puts more cattle on the common than are *levant* and *couchant* (1 Roll. Ab. 320. 405, pl. 5. Yelv. 104. 2 Bulst. 117); and *semble*, he cannot, although some of the cattle have not been *levant* and *couchant*. 1 Will. Saund. 346, *d*.

(*i*) 1 Will. Saund. 346, *d*.

(*k*) 2 Roll. Ab. 706, p. 41. *Sloper v. Allen*, 1 Brownl. 171. 1 Will. Saund. 346, *d*.

(*l*) But *qu.* whether in such case the commoner might not help himself, by entering a *nolle prosequi* as to the cattle which were not *levant* and *couchant*, and proceed for the rest.

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In trespass.
Proof on special issue.
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lord brought an action of trespass *quare clausum fregit*, and the defendant prescribed for his commonable cattle *levant* and *couchant*, and averred * that he put such his commonable cattle *levant* and *couchant* into the common, and upon issue taken it appeared that some were, and some were not, *levant* and *couchant*, the defendant would it seems, be entitled to a verdict, the plaintiff having traversed the *levancy*, and *couchancy*, instead of new assigning the trespass, by stating that he brought his action for depasturing the common with other cattle; and this upon the general principle, that in trespass it is sufficient for the defendant to prove that which excuses the trespass, although not to the extent of the number or amount specified in the declaration (*m*).

The defendant cannot give his right of common in evidence under the general issue in trespass (*n*).

Reputation.

It has already been seen, that evidence of reputation is admissible to prove customary rights where many are interested (*o*), although such evidence be not admissible to prove a private prescriptive right.

Competency.

The general rule is, that if the issue be on a customary right of common, by the establishment of which the witness would be benefitted, he is incompetent; but that where he gives evidence to establish the private prescriptive right of another, he is competent (*p*). Thus, if the issue be on a right of common which depends upon a custom pervading the whole manor, the evidence of the commoner is inadmissible, because, as the right depends upon the custom, the record in that action would be evidence in another action brought by that very witness to try the same right (*q*) (1). In such a case, although the witness be not * 392 a party to the * action, yet he claims under the same title with the party whose witness he is, and thereby mediately

(*m*) See tit. *Trespass*; and 2 Will. Saund. 346, *d*.

(*n*) Co. Litt. 283, *a*. Gil. Ev. 216.

(*o*) Vol. I. p. 60. *Weekes v. Sparks*, 1 M. & S. 679. Carth. 181. For further observations, see tit. *Custom*.

(*p*) 3 T. R. 32, 33. 1 T. R. 302.

(*q*) Per Buller, J. 1 T. R. 302.

(1) [In trespass *quare clausum fregit*, where the defence was that the *locus in quo* was, and had been for sixty years, used by the inhabitants of Staten Island as a free and common fishery; an inhabitant of the island was held not to be a competent witness for the defendant. *Jacobson v. Fountain & al.* 2 Johns. 170. And a release by such inhabitant of his right to the fishery will not restore his competency. *ibid.*]

establishes his own title (*r*). So where the issue was upon the question, whether the defendant was bound *ratione tenuræ* to repair a fence contiguous to a common on which the plaintiff prescribed for common appurtenant, it was held that another commoner was not a competent witness (*s*). Neither is a commoner competent to extend the limits of such rights (*t*). But the same reason does not apply where common is claimed by prescription in right of a particular estate; for if *A.* has a prescriptive right of common belonging to his estate, it does not follow that *B.*, who has also an estate in the same manor, has the same right; and the judgment for *A.* would not be evidence for *B.* (*u*). So if *A.* *B.* *C.* and *D.* claim common in dale, exclusively of all other persons, and the right of *A.* comes in dispute, *B.* may be a witness to prove *A.*'s right of common there, for in effect he charges himself by proving that another has a right of common there (*x*).

One who claims common *pur cause* of vicinage is not, it is said, incompetent, for this is no interest, but only an excuse for a trespass (*y*).

COMPETENCY.

THE general rule is, that all are competent as witnesses who are both *able* and *willing* to declare the * truth (*a*). Consequently, the circumstances which wholly disqualify a person as a witness, are, 1st. The want of religious belief, such as renders the party incapable of the obligation of an oath. 2ndly. The infamy of his character (*b*). 3rdly. A legal interest in the result of the cause. Perhaps to these thus disqualified, ought to be added parties to a cause, for although they are disqualified by interest from being witnesses for themselves, yet this is not the sole ground of exclusion, for if it were, it would follow that one party might call his adversary in

(*r*) B. N. P. 283; and see *The Duke of Somerset v. France*, 1 Str. 654.

(*s*) *Ancombe v. Shore*, 1 Taunt. 261.

(*t*) *Bagshaw v. The Bishop of London*, Cor. Denton.

(*u*) Per Buller, J. 1 T. R. 303. "And yet," adds the learned Judge, "there are cases which lay it down as a general rule that one commoner cannot be a witness for another."

(*x*) Per Holt, L. C. J. in *Hockley v. Lamb*, 1 Ld. Raym. 731.

(*y*) B. N. P. 285.

(*a*) *Supra*, Vol. I. p. 79, 80.

(*b*) *Ibid.* p. 83.

(*c*) *Ibid.* p. 80.

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the cause to give evidence against himself, which he cannot do. The rule seems, therefore, to be partly founded in policy for the purpose of preventing perjury, and its effect will hereafter be more fully considered (*d*).

1st. Want of religious belief, as in the case of children, lunatics, and atheists.

Of children.

The testimony of a child cannot be received, except upon oath, either in civil or criminal cases (*e*). But there is no fixed and settled age at which a child shall be admitted to be sworn (*f*); the competency of an infant must necessarily depend upon the degree of knowledge and understanding which upon examination he is proved to possess, rather than upon mere age (*g*) (1).

In civil as well as criminal proceedings the competency of an infant is a question for the discretion of the Court.

In criminal cases, where a child is to be examined, it is usual for the Judge to examine as to competency, * 394 * before the witness goes before the grand Jury. There have been instances in which a child of the age of nine years has been admitted to give evidence (*h*) (2). Where a child has upon such examination been found to be incompetent, the Court has in its discretion postponed the trial, in order to allow time for communicating the requisite religious information and instruction to the child (*i*).

(*d*) See tit. *Interest—Parties*.

(*e*) *R. v. Brazier*, Leach, 182. Fost. 70.

(*f*) 1 Hale, 302. 2 Hale, 278.

(*g*) 2 Hale, 278. 2 Haw. c. 46. 11 Mod. 228. Stra. 700. *R. v. Powel*, Leach, 129.

(*h*) Fost. 70. 2 Haw. c. 46, s. 160. 1 Brownl. 47. 2 Hale, 278.

(*i*) *R. v. Murphy*, Leach, 482.

(1) [*S. P. Commonwealth v. Hutchinson*, 10 Mass. Rep. 225, where a child under nine years of age was admitted as a witness, he appearing, on examination by the court, to have a sufficient sense of the wickedness and danger of false swearing. See Swift's Ev. 46, *acc.* A child under fourteen years of age is presumed to be incapable of giving evidence, and the fact of capacity must be shown. *The State v. Doherty*, 2 Overton's Rep. 80. But a person above the age of fourteen years is presumed to be competent, and may be sworn without a previous examination as to his knowledge of the nature and obligation of an oath, unless some reason creating suspicion be shown. *Den v. Vancleve*, 2 Southard's Rep. 589. See 18 Johns. 105.]

(2) [See *R. v. Kelly*, M'Nally, 154, where a child seven years old was received as a witness in a capital case in Ireland.]

There is no difference between capital cases and misdemeanors, as to admitting the testimony of a child (*k*).

A lunatic may be admitted to give evidence during a lucid interval (*l*) (1).

The exclusion of testimony on the ground of the moral turpitude of the party (*m*), and also on the ground of interest (*n*), will be subsequently considered. Infamy.—
Interest.

In all other cases it seems that a party is in point of law competent to be sworn and examined as a witness. Thus, *aliens* still are, and villeins and bondmen were formerly, held to be competent (*o*).

A foreigner may be examined by means of an interpreter, and even a deaf and dumb person may be examined as a witness, if communication can be made by signs (*p*).

Outlawry in a personal action is no exception to a witness, as it is to a Juror (*q*). The relationship of the * witness to the party for whom he gives his evidence is no disqualification (*r*), except in the case of husband and wife. * 396

A Judge or Juror is a competent witness (*s*). A Judge who has sat on one trial may be called as a witness for the defendant upon a subsequent trial (*t*). Where a Juror knows any fact material to the cause, he ought to be sworn, and give evidence of it to his fellows (*v*).

CONFESSION. See *Admission*.

(*k*) Per Raymond, C. J. Stra. 700.

(*l*) Bac. Ab. Ev. A. 2 Hale, 278. Leach, 507. [Swift's Ev. 46.]

(*m*) See tit. *Infamous Witness*.

(*n*) See tit. *Interest—Husband & Wife*.

(*o*) *R. v. The Duke of Norfolk*, 13 Eliz. 1 St. Tr. 113. [2 Binney, 165, per Tilghman, C. J.]

(*p*) *R. v. Bartlett*, Leach, 455. *R. v. Steele*, Leach, 507. 2 Hale, 317. *R. v. Jones*, Leach, 120.

(*q*) Co. Litt. 6. 1 Hale. 303. 38 Hen. VI. 32, pl. 2. 2 Roll. Ab. 675, *semble contra*.

(*r*) Co. Litt. 6. See tit. *Husband & Wife*; *supra*, Vol. I. p. 104; & *infra*, tit. *Interest*.

(*s*) 2 Haw. c. 46. Kel. 12. 1 Sid. 133. 2 St. Tr. 384.

(*t*) *R. v. Oates*, 4 St. Tr. 40. 85.

(*v*) Ante, Vol. I. p. 449.

(1) [A person offered as a witness may be shown by testimony to be *non compos mentis*; and if he be so proved, he must be rejected. *Livingston v. Kiersted*, 10 Johns. 362.]

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CONFIDENTIAL COMMUNICATION.

THE rule, that a counsel, solicitor, or attorney, shall not be permitted to divulge any matter which has been communicated to him in professional confidence, has already been adverted to as one that is founded on the most obvious principles of convenience (*u*). This is the privilege of the client, and is founded on the policy of the law which will not permit a person to betray a secret which the law has intrusted to him (*x*). To allow such an examination would be a manifest hinderance to all society, commerce, and conversation (*y*) (1).

With respect to such communications, the mouth of the witness is for ever sealed, and he cannot reveal them at any time, or in any proceeding, although the client be no party to it, however improbable it may be under the circumstances that any injury can result to him from the

(*u*) Vol. I. p. 104, sec. lxxvii.

(*x*) B. N. P. 284. Rayner Read. 111. 9 St. Tr. 387. *Annesley v. Earl of Anglesea*, 8 St. Tri. 142. 380.

(*y*) See 12 Vin. Ab. B. a. pl. 1.

(1) [The earliest case that has been found on this subject is *Berd v. Lovelace*, 19 Eliz. Cary's Rep. 88, thus—Thomas Hawtry was served with a subpoena to testify his knowledge touching the cause in variance; and *made oath* that he hath been and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry *shall not be compelled* to be deposed touching the same; and that he shall be in no danger of any contempt, touching the not executing of the said process.

In *Austen v. Vesey*, Cary's Rep. 89, for that it appeared by *affidavit*, that the witness was solicitor in the same cause to one of the parties, he was discharged, and *not admitted* to be examined.

In *Kelway v. Kelway*, Cary's Rep. 126, upon *certificate* that Roger Taylor refused to be examined, because he solicits the plaintiff's cause; it is therefore ordered, that the defendant shall examine, before one of the commissioners of the court, the said Roger Taylor upon any interrogatory, which shall not be *touching the secrecy of the title*, or of any other matter *which he knoweth as solicitor only*.

In *Dennis v. Codrington*, Cary's Rep. 143, the plaintiff seeks to have Master Oldsworth examined touching a matter in variance, wherein he hath been of counsel; it is ordered he shall not be compelled by subpoena, or otherwise, to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties, or with either of them by reason of any annuity or fee. See also *Wilson v. Grove*, Tothill, 177.

These early decisions in chancery, though they seem to have been generally overlooked, contain the principles which are applied at this day.]

disclosure (z), and although the relation * of attorney and client has ceased by the dismissal of the attorney (a).

The rule is strictly confined to counsel, solicitors, and attornies (b) (1). It has even been held at Nisi Prius that where a communication was made to the witness under the mistaken idea that he was an attorney, when the fact was otherwise, the witness was bound to reveal it (c). It extends indeed to an interpreter between a client and his counsel or attorney, for this may be essential to the communication between the parties, and the privilege rests upon the same grounds (d). But it does not, it seems, extend to a communication made to an attorney, which has been accidentally overheard by another witness (e), for this is owing to the negligence of the client him-

To what persons the rule is confined.

(z) *Wilson v. Rastall*, 4 T. R. 753. Per Buller, J. 4 T. R. 759. *Vide etiam*, *Sloman v. Herne*, 2 Esp. C. 695. *Rex v. Withers*, 2 Camp. 579. *Maddock v. Maddock*, 1 Ves. 262. *Bishop of Winton v. Fournier*, 2 Ves. 446.

(a) *R. v. Withers*, 2 Camp. 578. [6 Ves. 280.]

(b) *R. v. Duchess of Kingston*, 11 St. Tr. 246. [*Mills v. Griswold*, 1 Root, 383.] The principle (*semble*) does not extend to a letter written by the attorney to the client, and indorsed by the client. *Meyer v. Seston*, 2 Starkie's C. 274. Nor to a communication made to an interpreter in the absence of the attorney. *Du Barre v. Livette*, Peake's C. 77. Nor to what took place at the execution of a deed. 5 Esp. C. 52. See *Bicknell v. Keppell*, 1 N. R. 21. Nor to an admission of a debt made by the attorney to the adverse party, by direction of his client. *Turner v. Railton*, 2 Esp. C. 474. Nor to proof of identity.. 2 D. & R. 347.

But the rule is not confined to communications made in the course of a cause, or with a view to a cause. *Cromack v. Heathcote*, 2 B. & B. 4; *Gainsford v. Grammar*, 2 Camp. 9. But extends to all cases where the party applies for professional assistance. *Ibid.* and 6 Mad. 47. But not to cases where the attorney is employed in matters which are not professional, as in a treaty for the purchase of an estate. *Ib.* The rule extends to facts which the attorney becomes acquainted with in the character of an attorney, although the communication was not made by his client. *Robson v. Kemp*, 5 Esp. C. 52. Such as communications made by third persons who accompanied the client when he came to consult the attorney. *R. v. Withers*, 2 Camp. 579. And to the contents of a written instrument, which he has by delivery from his client. *Brard v. Ackerman*, 5 Esp. C. 120.

(c) *Fountain v. Young*, 6 Esp. C. 113.

(d) *Madame Du Barre's case*, cited 4 T. R. 756. [Peake's C. 77.]

(e) *Wilson v. Rastall*, 4 T. R. 753.

(1) [The rule does not apply to a student in the office of an attorney or counsellor. *Andrews & al. v. Solomon & al.* 1 Peters' Rep. 356.]

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which the attorney acquired by any other means than by the *confidential* communication by the client. Thus, an attorney is compellable to identify the person of his client (*r*), to prove that his client swore to and signed an answer in chancery, upon which he is indicted for perjury (*s*); to prove the execution of an instrument by his client, to which he is an attesting witness (*t*); to prove any collateral fact within his own knowledge, independently of any professional communication; as, to prove the hand-writing of his client (*u*); in an action of debt upon a bond, to prove that the consideration * 399 * was usurious (*x*); to prove, where the question is as to an erasure in a deed or will, any facts as to the state of the instrument which he knows independently of a professional communication by his client (*y*); or to prove the contents of a written notice to produce papers (*z*); in short, the attorney may disclose any matter except that which has been confidentially and professionally intrusted to him by a client (*a*). (1)

(*r*) *R. v. Watkinson*, 2 Str. 1122. B. N. P. 284. Cowp. 846.

(*s*) Per Ld. Mansfield, Cowp. 845.

(*t*) *Doe v. Andrews*, Cowp. 846. Every man, by attesting an instrument, pledges himself to come forward to prove it. Ibid. and *Ld. Say and Seale's case*, 10 Mod. 40.

(*u*) 2 Haw. c. 46, s. 89.

(*x*) *Duffin v. Smith*, Peake's C. 108.

(*y*) B. N. P. 284. 1 Vent. 197.

(*z*) *Spencely v. Schulenberg*, 7 East, 357, [and Mr. Day's note to that case.]

(*a*) It has been said that it does not extend to a communication made by a client to his counsel, where it is mere conveyance. *South Sea Company v. Jolliffe*, cited 2 Atk. 522.

(1) [Where an attorney or counsellor, after the commencement of the suit and without any communication from his client, acquires a knowledge of his handwriting, he may be called upon to testify to its identity. *Johnson v. Daverne*, 19 Johns. 134. An attorney may be called upon to prove the execution of a deed entrusted to him by his client, and that it is in his possession, so as to entitle the opposite party, on his refusing to produce it after notice, to give parol evidence of its contents: But the attorney cannot be compelled to produce such deed, nor to disclose its date or contents. *Brandt v. Klein*, 17 Johns. 335. S. P. *Jackson v. McVey & al.* 18 Johns. 330.

An attorney may give evidence that a bond was lodged with his client by way of indemnity, or that his client expressed himself satisfied with a certain security—or any collateral facts. *Heister v. Davis*, 3 Yeates, 4. He may be examined whether a note put into his hands to collect was indorsed or not. *Baker v. Arnold*, 1 Caines' Rep.

The privilege is that of the client and not of the witness (b), and therefore the Court will interfere to protect the client, although the witness be willing to betray his trust (c); and a Court of Equity has ordered such matter to be expunged (d). But the client may, if he will, wave this privilege, as he may any other (e). And if a counsel or attorney be called as a witness by his client, he is not protected from cross-examination as to the point upon which he has been examined in chief, although it was matter of confidential communication. But such cross-examination must be confined to the same matter, and must not be extended to other points in the cause (f).

The rule applies, whether the question be asked upon an examination in chief, or upon cross-examination (g).

The course of proceeding in Mr. Aylott's case is somewhat singular. He had been counsel for the * defendant, and being called as a witness for the plaintiff, the Court acceded to his request that he might not be sworn in the usual way on the *general oath*, but only to reveal such things as he knew before he was counsel, or as had come to his knowledge since by other persons, and the particulars to which he was to be sworn were specifically proposed; viz. what he knew concerning the will in question (h). Such a precaution, however, seems to arise out of an excessive tenderness of conscience. The general obligation of the oath to declare the whole truth, must, with reference

* 400

Form of the
oath.

(b) B. N. P. 284. *Petrie's* case, cited 4 T. R. 756. 759.

(c) 4 T. R. 759. 2 Ves. jun. 189.

(d) *Sandford v. Kensington*, 2 Ves. jun. 189.

(e) Phill. Ev. 108.

(f) *Vaillant v. Dodemead*, 2 Atk. 524.

(g) *Waldron v. Ward*, Style, 449. 12 Vin. Ab. B. a.

(h) *Sparke v. Sir Hugh Middleton*, 1 Keb. 505, pl. 68. 12 Vin. Ab. B. a. pl. 4.

Rep. 258. So he may be compelled to disclose terms of compromise offered by him to his client's creditors. *M'Tavish v. Dunning*, Author's N. P. C. 82.

One who had signed a note as attorney for another, and had afterwards given bond for his principal to prosecute an appeal from a judgment on the note, was held not to be privileged thereby from giving evidence for the payee to prove its execution. *Phelps v. Riley*, 3 Conn. Rep. 266. See *Caniff v. Myers*, 15 Johns. 246.

An attorney or counsellor is not obliged to produce a paper, entrusted to him by his client, in order that the grand jury may inspect it on a charge of forgery against the client. *Anon.* 8 Mass. Rep. 370. *The State v. Squires*, 1 Tyler, 147. *R. v. Dixon*, 3 Bur. 1687. See 12 Mod. 341.]

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IV.

Exceptions.

to the subject matter and occasion of the oath, be necessarily understood to mean the truth, so far as it ought legally to be made known (i).

It has been seen, that where an informer makes a disclosure to a magistrate, or agent of government, neither the names of the parties to whom the information has been given, nor the nature of the communication itself, is allowed to be revealed (k).

A clerk attending on a grand Jury was not allowed to reveal what was given in evidence before the inquest, the Jurors themselves being sworn to keep secret all that passes before them (l) (1).

CONSPIRACY.

* 401
Circumstantial
evidence.

UPON an indictment for a conspiracy, the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or, more usually, from the very * nature of the offence, is circumstantial. It is not necessary to prove any direct concert, or even meeting, of the conspirators (m). If several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy (n).

A concert may be proved by evidence of a concurrence of the acts of the defendant with those of others, connected together by a correspondence in point of time, and in their manifest adaptation to effect the same object. Such evidence is more or less strong, according to the danger, publicity, or privacy of the object of concurrence, and according to the greater or less degree of similarity in the means and measures adopted by the parties; the more secret the one, and the greater the coincidence in the other, the stronger is the evidence of the conspiracy. In general,

(i) See Paley's Moral Philosophy. Book II. c. 17.

(k) Vol. I. p. 106, 7, sec. lxxx. On the trial of *Stone* for high treason (6 T. R. 527), *Ld. Grenville* produced a letter of *Jackson's*, a co-conspirator, which had been transmitted to him from abroad in a confidential way, and stated that he could not possibly divulge by whom it had been communicated.

(l) Vin. Ab. Ev. 38.

(m) 1 Bl. R. 392. 401. *R. v. Cope*, 1 Str. 144.

(n) *R. v. Lee*; MS.

(1) [In *The Commonwealth v. Tilden*, Feb. 1823, Norfolk County (Mass.) it was ruled by Putnam, J. that the attorney for the Commonwealth could not be called upon to testify to what passed in the grand jury's room.]

proof of concert and connection must be given before the prisoner can be affected by the acts of others (o).

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IV.

Where it appeared that there was a conspiracy to levy war in the North Riding of Yorkshire, and that there was at the same time a similar conspiracy in the West Riding, in which latter only it took place, and there was no evidence to show that those in the one Riding knew of the conspiracy in the other, it was held that the former could not be implicated in the acts of the latter (p), although they concurred at the same time to the same object.

Circumstantial
evidence.

Upon an indictment against a card-maker, his wife and family, for a conspiracy to ruin another card-maker, it was proved that each had given money to the apprentices of the prosecutor to put grease into the paste which he used, in order to spoil the cards, it * was objected that no two of the defendants were ever together when this was done; but Pratt, C. J. said, that as they were all of one family, and concerned in making cards, this was evidence to go to a Jury (q).

* 402

Upon the trial of an information for a conspiracy to take away a man's character, by means of a pretended communication with a ghost in Cock-lane, Lord Mansfield informed the Jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances (r).

Where the charge of conspiracy is in its nature cumulative, it may be proved by evidence of repeated acts: Thus, where the charge was of a conspiracy by the defendants, to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, and evidence was given of their having hired a house in a fashionable street, and that they represented themselves to a tradesman employed in furnishing it, as persons of large fortune, evidence of a similar representation to another tradesman having been objected to, Ld. Ellenborough admitted the evidence, saying, that as it was an indictment for a conspiracy to carry on the business of common cheats, cumulative instances were necessary to prove the offence (s).

Upon an indictment which charged the defendants with a conspiracy to cheat and defraud the prosecutor, General Maclean, by selling him an unsound horse, it appeared that

(o) East's P. C. 97.

(p) Kel. 19. East's P. C. 97.

(q) R. v. Cope, 1 Str. 144.

(r) R. v. Parsons, 1 Bl. R. 392.

(s) R. v. Roberts & others, 1 Camp. 399.

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IV.Circumstantial
evidence.

* 403

one of the defendants (Pywell) had advertised the sale of certain horses, with a warranty of their soundness; and that another of the defendants, upon an application by the prosecutor at Pywell's stables, stated that he had lived with the owner of a * horse then shown to the prosecutor, and that he knew him to be perfectly sound, and, as the agent of Pywell, would warrant him to be sound; the prosecutor purchased the horse, and discovered, soon after the sale, that he was nearly worthless. Lord Ellenborough held that no indictment in such a case could be maintained without evidence of concert between the parties to effectuate a fraud; and the defendants were acquitted (t).

Acts of con-
spiracy.

Where several conspire to procure an employment under Government by corrupt means, it seems that a banker who receives the money in order to pay it over for that purpose, becomes a party to the conspiracy (u).

Act of one evi-
dence against
the rest.

Where several combine together for the same illegal purpose, each is the agent of all the rest, and any act done by one in furtherance of the unlawful design is, in consideration of law, the act of all (x). (1) And as a declaration accompanying an act strongly indicates the nature and intention of the act, or, more properly, perhaps, is to be considered as part of the act, a declaration made by one conspirator at the time of doing an act in furtherance of the general design, is evidence against the other conspirators. It is for the Court to judge whether a sufficient connection has been established to affect one person with the acts of others (y).

* 404

In *Stone's* case (z), the defendant was indicted for treason, and charged with conspiracy with *Jackson* to * collect and communicate intelligence to the French government, in order to assist the king's enemies, &c. after evidence

(t) *R. v. Pywell & others*, 1 Starkie's C. 402.

(u) *R. v. Pollman & others*, 2 Camp. 233.

(x) *R. v. Stone*, O. B. 1796.

(y) *East's P. C.* 97.

(z) 6 T. R. 527. Note, in this case *Ld. Kenyon* said that he should have doubted as to the admissibility of such evidence if it had not been sanctioned by the authority of the Judges who sat at the Old Bailey on the late trials for treason; but he afterwards said that, on consideration, he thought they had done right in admitting the evidence.

(1) [Proof of an overt act by one, in pursuance of a conspiracy by several, is sufficient to convict all. *Collins v. Commonwealth*, 3 Serg. & Rawle, 220. See also *Ex parte Bollman v. Stuart*, 4 Cranch, 75. 1 Robinson's Report of Burr's Trial, 21. 2 *ibid.* 401, & seq.]

had been given of a conspiracy for this purpose, a letter of *Jackson's* containing treasonable information, which had been transmitted to Ld. Grenville from abroad, was admitted in evidence against the prisoner; and the case of *The King v. Bowes & others* was cited, where Buller, J. upon an indictment against the defendants for a conspiracy to carry away Lady Strathmore, had laid down the same doctrine (a). So in the cases of murder and burglary the acts of one are frequently received against another engaged in the same design.

Acts of others,
when evidence.

In *Watson's* case (b), after evidence of a treasonable conspiracy, to which the prisoner, who was upon his trial, was a party, it was held that papers found in the lodgings of a co-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, although no absolute proof had been given of their previous existence, strong presumptive evidence having been adduced to show that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers (c). The papers in this case were proved to be intimately and immediately connected with the objects of the conspiracy, as detailed in evidence. Upon the same trial, evidence having been given that a paper containing seditious questions and answers had been found in the possession of a co-conspirator, but had * not been published, the Court doubted whether the paper * 405 was sufficiently connected by evidence with the object of the conspiracy to render it admissible, and it was not read; but they held, that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would clearly be admissible (d).

It seems however, on the other hand, that a mere gratuitous assertion inculcating himself and others, although made by a co-conspirator, would not be evidence against any one but himself. As against himself it would be evidence, upon

(a) 30th May, 1787. The cases of *The King v. Hardy* and *Tooke*, O. B. 1794, were also cited.

(b) 2 Starkie's C. 140.

(c) But it would be otherwise, if, as in *Hardy's* case, the papers were found in the possession of persons after the prisoner's apprehension; those persons might have obtained possession of them after his apprehension. 2 Starkie's C. 141.

(d) *Watson's* case, 2 Starkie's C. 141. See also *R. v. Salter*, 5 Esp. C. 125. where the declarations made at a meeting of persons to appoint delegates were admitted to prove the conspiracy, on an indictment for a conspiracy to procure a workman to be discharged. See *the Queen's case*, 2 B. & B. 310. Post. 1757.

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Acts of others,
when evi-
dence.

the general ground that any declaration or admission connected with the charge, whether oral or written, is admissible in evidence against the party who makes it (e); but, as against another person, it is no more than the mere gratuitous declaration of a stranger not upon oath.

Although in general, upon principles already adverted to (f), the act or declaration of one man is not evidence against another who is charged as a co-conspirator, until such a privity and community of design has been established between them as affords a reasonable presumption that the act or declaration of one is the act or declaration of the other, made with his sanction, and therefore indicating his mind and intention; and although it follows, from these principles, that such a connection must be established before the acts and declarations of one man can properly be used as evidence to show the designs of another, yet, in some peculiar instances, where it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from this rule, and evidence of the acts and conduct of * others has been admitted to prove the existence of a conspiracy, previous to the proof of the defendant's privity.

* 406

In *Hardy's* case (g), Buller, J. said, in an indictment of this sort there are two things to be considered: first, whether any conspiracy exists; next, what share the prisoner took in that conspiracy. But the same learned Judge afterwards added, "Before the evidence (that is, of the conspiracy so proved to exist) can affect the prisoner materially, it is necessary to make out another point, namely, that he consented to the extent that the others did (h)."

To prove the
existence of a
conspiracy.

The rule that one man is not to be affected by the acts and declaration of a stranger, rests on the principles of the purest justice; and although the Courts, in cases of conspiracy, have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence in order to establish the fact of a conspiracy, it is to be remembered that this is an inversion of the usual order, for the sake of convenience, and that such evidence

(e) See tit. *Admissions*.

(f) *Supra*, tit. *Admissions*, 47; & *vid. infra*, 409.

(g) Gurney's edition, Vol. I. p. 360 to 369.

(h) See also the observations of Eyre, C. J. in the course of the same trial; where he says, "In the case of a conspiracy, general evidence of the thing conspired is received, and then the party before the Court is to be affected for his share of it."

is in the result material so far only as the assent of the accused to what has been done by others is proved.

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The case admits of this illustration:—Suppose that a witness overhears a conspiracy actually entered into between three persons whom he cannot identify; if there be circumstantial evidence to prove that *C. D.* the defendant, was one of those conspirators, proof of the conspiracy would first be admitted, and then the question would be, upon the circumstantial * evidence, whether *C. D.* was one of the parties who conspired.

To prove the existence of a conspiracy.

* 407

It seems, however, that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy (*i*), although consultations for the purpose (*k*), and letters written in prosecution of the design, but not sent (*l*), are admissible.

Mr. J. Buller, indeed, in *Hardy's* case, considered mere declarations of strangers to be evidence to prove the existence of a conspiracy, upon the ground, as it seems, of necessity. There appears, however, to be no authority for admitting evidence in criminal cases, upon the plea of necessity, which, in principle, is inadmissible.

Mere declarations.

The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by the two great tests of truth. The mere assertion of a stranger that a conspiracy existed amongst others, to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principles fully established, would not make the assertion evidence of the fact against strangers (*m*).

These positions are illustrated by the following authorities:

In the case of *Lord Stafford* (*n*), evidence was first given of a general conspiracy, before any proof of the particular part which the accused took in that conspiracy. * And a similar course was adopted upon the trial of *Lord Lovat* (*o*).

* 408

In *Lord William Russel's* case (*p*), Lord Howard was

(*i*) *Infra*, 409, 410.

(*k*) *Ld. Russel's* case; and see the observations of Buller, J. in *Hardy's* case, upon that case.

(*l*) *Infra*, 410.

(*m*) It might possibly be different if the liability of it depended upon that of the party, who made the admission. See p. 47, 48.

(*n*) 32 Car. II. 3 St. Tr. 101.

(*o*) 19 Geo. II. 9 St. Tr. 616.

(*p*) 35 Car. II. 3 St. Tr. 306.

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Acts to prove a
conspiracy.

permitted to go into evidence of a conversation between himself and Ld. Shaftesbury, as to the number of forces which he had in readiness, and (as observed by Mr. J. Buller) the Chief Justice repeated this to the Jury as evidence of a *consult*, but not as affecting Lord Russel.

In *Hardy's* case, upon an indictment for high treason in conspiring the death of the king, it was proved that Thelwall, (who was indicted for the same offence, but was not upon his trial), and the prisoner, were both members of the Corresponding Society. Evidence was admitted to prove that Thelwall brought a paper with him to a printer, and desired him to print it, on the ground, that both being members of the society, (of which the prisoner was secretary), and the paper having been produced by one of them, it was evidence to prove a circumstance in the conspiracy, although whether it would ultimately be so brought home to the prisoner, that he should be responsible for the guilt of publishing it, might be another question (*q*).

In the same case, it was proposed to read a letter written by Thelwall to a private friend, containing several of the addresses of the society, and three of the Judges (*r*) were of opinion that the evidence was inadmissible, since the letter amounted to nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot, for the furtherance of the plot; it was a sort of confession by T., and not like a fact done by him, as * 409 in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the Judges (*s*) were of opinion that the evidence was admissible, on the ground that every thing said, and *a fortiori*, every thing done, by the conspirators, was evidence to show what the design was.

In the same case, it was proposed to read a letter written by Martin in London, and addressed, but not sent, to Margat in Edinburgh, (both being members of the Corresponding Society,) on political subjects calculated to inflame the minds of the people in the North. Eyre, C. J. was of opinion that this letter was not admissible in evidence, being in the nature of a confession only, and therefore not evidence against any but the party confessing; two of the Judges (*t*), agreed that a bare relation of facts by a conspirator to a stranger was merely an admission

(*q*) Per Eyre, C. B. to which the other Judges assented.

(*r*) Eyre, C. J. Macdonald, C. B. and Hotham, B.

(*s*) Buller and Grose, J's.

(*t*) Macdonald and Hotham, B.

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which might affect himself, but which could not affect a conspirator, since it was not an *act* done in the prosecution of that conspiracy, but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as an act to show the nature and tendency of the conspiracy alleged, and endeavoured to be proved as the foundation for affecting the prisoner with a share of the conspiracy.

Acts to prove a
conspiracy.

Buller J. was of opinion, that evidence of conversations and declarations by parties to a conspiracy were in general, and of necessity, evidence to prove the existence of the combination; Grose, J. was of the same opinion, but added, that he considered the writing as an act which showed the extent of the plan.

Upon the last point, it is observable, that of the five learned Judges who gave their opinions, three of them * considered the writing of the letter to be an act done; * 410 and that three of them declared their opinion, that a mere declaration or confession, unconnected with any act, would not have been admissible.

In the case of *Horne Tooke*, who was afterwards tried upon the same indictment, the draught of a letter intended to have been sent by Hardy, in answer to a letter, as secretary to the Corresponding Society, and found in his possession, was admitted in evidence (u).

Upon the same trial, a letter, purporting to have been written by the secretary of a society in Sheffield, and addressed to the prisoner, the secretary of the London Corresponding Society, but found in the possession of Thelwall, another member of the society, who also acted as agent for the society, was admitted in evidence (x) without dissent.

Upon an indictment against the defendants, who were journeymen shoemakers, charging them with a conspiracy to raise their wages, evidence was admitted of a plan for a combination of journeymen shoemakers, formed and printed several years before; and it was proved by a witness, who

(u) O. B. 1794.

(x) *Hardy's* trial, by Gurney, vol. I, 412, 413. See also Lord Ellenborough's observations, 11 East, 584, Post. tit. *Trespass*, 1450.

Where part of a correspondence between two defendants, indicted for a conspiracy to defraud the prosecutor on the sale of an annuity, had been read upon the trial, against the party on trial, whose defence was that he had been deceived by the other party, it was held that the whole of the correspondence previous to the consummation of the purchase was admissible, but not the subsequent part. *R. v. Whitehead*, 1 D. & R. 61.

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conspiracy.

was a party to the association, that he and others acted upon the rules and regulations so proved in execution of the conspiracy; and this evidence was admitted by *Ld. Kenyon* as introductory to the proof that the defendants were members of the society, and equally concerned; but he stated, that this would not be evidence against the defendants until it was proved that they were parties to the conspiracy (y).

Where one of several charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried (z).

- * 411 * It seems to make no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter, for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.

Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention would be evidence against the rest (e).

Evidence is admissible of a conspiracy either before or after the day laid in the indictment (a).

Conspiracy to
marry paupers.

Upon the trial of an indictment for a conspiracy to marry a poor couple in order to charge a parish, it must be proved that the husband is unable to maintain himself and his family; and it is not sufficient to show that he was a servant employed in husbandry (b). An averment that *J. S.* is now legally settled in a particular parish, is supported by evidence that he was settled there shortly before the finding of the indictment (c). It has been said, that it is ne-

(y) *R. v. Hammond & Webb*, 2 Esp. C. 718.

(z) *R. v. Horne Tooke*, O. B. 1794. In this case it was held, that during the same sittings, the indictment itself, with the officer's notes, are evidence, without the record formally drawn up.

(e) See 6 T. R. 528.

(a) *R. v. Charnock & Keys*, 4 St. Tr. 570.

(b) 1 Esp. 304; and per *Ashhurst, J.* indictments which have been sustained for injuries of this nature have been for procuring a marriage where the man was a pauper, and actually chargeable.

(c) *R. v. Tanner & al.* 1 Esp. 304.

cessary to * show that the marriage was against the will of the parties (*d*).

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Buller, J. held, that the procuring the marriage by the gift of money was insufficient without proof that some threat or contrivance was used for the purpose (*e*), and that it was against their consent. To marry paupers.

In the case of *Ld. Grey* and others, who were tried upon an information which charged them with conspiring and intending to ruin Lady Henrietta Berkeley, a virgin, unmarried, and within the age of eighteen years, she being under the custody, &c. of the Earl of Berkeley, her father, and with soliciting her to desert her father, and commit whoredom and adultery with *Ld. Grey*; and which also charged, that in prosecution of such conspiracy, they took away the Lady Henrietta at night from her father's house and custody, and against his will, the defendants were found guilty, although there was no proof that any force was used, and although it appeared, on the contrary, that Lady Henrietta, who was examined as a witness, concurred in the measures which were taken for her removal (*f*) (1). Proof as to the means used.

The wife of one co-defendant, in a case of conspiracy, is not a competent witness for another defendant, since an acquittal of the other defendants would occasion the acquittal of her husband (*g*) (2). Competency.

Where the indictment alleged that *A. B. C.* and *D.* * conspired together to obtain to the use of them, the said * 413 Variance.

(*d*) 4 Burr. 2106. In *R. v. Edwards* (8 Mod. 320), this offence seems to have been considered as indictable on the ground of conspiracy only; but in *R. v. Tarrant* (Burr. 2106), an information was granted against a single overseer.

(*e*) *R. v. Fowler & others*, East's P. C. 461. See Stark. Crim. Plead. 685, 6.

(*f*) *R. v. Ld. Grey & others*, East's P. C. 460. 3 St. Tr. 519.

(*g*) *R. v. Lockyer & others*, Cor. Ld. Ellenborough, 5 Esp. C. 107. 2 Stra. 1095. As to the competency of a person convicted of a conspiracy, see tit. *Infamous Witness*.

(1) [On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been relieved on *habeas corpus*, was allowed to be given in evidence. *Commonwealth v. Hevice & al.* 2 Yeates, 114.]

(2) [Swift's Ev. 92. *Commonwealth v. Eastland & al.* 1 Mass. Rep. 15. acc. But in South Carolina, where father and son were indicted for murder—the father being charged with having given the mortal wound, and the son with having been present, aiding and assisting—on the separate trial of the father, (who was first tried), the son's wife was held to be a competent witness for the defendant. *The State v. Anthony*, 1 M'Cord, 285.]

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Variance.

A. B. C. and *D.* and certain other persons to the jurors unknown, a sum of money for procuring an appointment under government, the evidence negatived *D.*'s knowledge that *C.* was to have any part of it; the money having been lodged in his hands, to be paid over to *B.*, it was held, that the averment as to the application of money was material, and that as to *D.*, the conspiracy was not proved as laid (*h*).

Where the indictment charged a conspiracy to prevent masters from taking into their employment *any* apprentices, and the evidence was, that the defendants attempted to prevent the masters from taking any apprentices in addition to those which they then had, it was held that the indictment was sufficiently supported by the evidence, since the effect was to prevent the masters from taking any apprentice into their service, as alleged in the indictment (*i*).

Where on an indictment for a conspiracy against *A. B.* and *C.*, *C.* called a witness, and examined him as to a conversation between himself (*C.*) and *A.*, it was held that the counsel for the prosecution were at liberty to examine as to other conversations between *A.* and *C.*, although they tended chiefly to criminate *A.*, who had called no witnesses (*k*).

CONSTABLE.

THE regular proof that *A. B.* is a constable, is by the production and proof of his appointment, and swearing at the court-leet, or by justices of the peace (*l*) (1) * on default of an appointment by the leet (*m*). It has however been seen, that even on a trial for murder, evidence that a party has acted as a constable is evidence to prove that he is one (*n*).

(*h*) *R. v. Pollman*, 2 Camp. 231.

(*i*) *R. v. Ferguson and Edge*, 2 Starkie's C. 489. See further, *Variance*; and 1 Esp. C. 304. [*Commonwealth v. Ward & al.* 1 Mass. Rep. 473.]

(*k*) *R. v. Kroehl & others*, 2 Starkie's C. 343. *Qu.* whether in such case a counsel would be entitled to address the Jury in reply.

(*l*) See the stat. 13 & 14 Car. II. c. 12, s. 15. 2 Haw. B. 2, c. 10, s. 37. 2 Str. 1149. 1 Bac. Ab. 439. The wardmote-book, containing the entry of the election, should be produced. *Underhill v. Witts*, 3 Esp.-C. 56.

(*m*) Haw. B. 2, c. 10, s. 49.

(*n*) *Supra*, tit. *Character*. *R. v. Gordon*, Leach, 581. *Berryman*

(1) [See *Wood v. Peake*, 8 Johns. 69. *Miller's case*, 1 Browne's Rep. 349. *Chambers v. Thomas*, 1 Littell's Rep. 268. 3 Marsh, 538. *Johnston v. Wilson & al.* 2 N. Hamp. Rep. 202.]

Where a constable acts under a warrant from a magistrate, it seems that he ought to keep the warrant for his own justification (o).

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CONVICTION.

For the proof of a conviction see Vol. I. p. 251, sec. xc.

For the effect of a conviction in proof, as a judgment, see Vol. I. p. 225, sec. lxxv ; and see also below tit. *Justices*.

A conviction is no evidence in a collateral proceeding for the party on whose evidence it has been obtained, although his name does not appear on the face of it (p) ; nor is it evidence to contradict the witnesses in a collateral proceeding, by showing that they had before given a different account before the committing magistrate (q).

Upon summary proceedings before magistrates, they are placed in the situation of a Jury, and the degree of credit to be attached to the evidence is for their consideration and judgment. Since, however, the proceedings before them are usually of a criminal and penal nature, and as they are substituted for a Jury of 12 men, who must, in order to convict, have all been satisfied * by the evidence of * 415 the criminality of the defendant, the evidence ought to be fully satisfactory, and convincing to the mind and conscience of the magistrate, before he pronounces the party to have been guilty. If any reasonable doubt exist in his mind, the party charged is entitled to the benefit of that doubt. Such cases, it is to be recollected, differ very materially indeed from those where mere civil rights are concerned, and where the mere preponderance of evidence may be sufficient to decide the question (r).

In point of law, the evidence will support a conviction by a magistrate, if there was such evidence before him as would have been sufficient to have been left to a Jury. If such evidence appear on the face of a conviction removed into the Court of King's Bench, the Court will not disturb the magistrate's decision, or examine to see whether the

v. *Wise*, 4 T. R. 366 ; & *supra*, tit. *Agent*, 55. *R. v. Verelst*, 3 Camp. 432. *R. v. Gardner*, 2 Camp. 513. *Lister v. Priestly*, Wightwick, 67.

(o) See Burn's J. tit. *Constable*, sec. 6. 24 Geo. II, c. 44, s. 6.

(p) *Smith v. Rummens*, 1 Camp. 9. *Burdon v. Browning*, 1 Taunt, 520.

(q) *R. v. Howe*, 1 Camp. 461. [6 Esp. C. 124. S. C.]

(r) *Vid. supra*, Part III.

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conclusion drawn by him be, or be not, the inevitable conclusion to be drawn from the evidence (s). So if the magistrate acquit, where there seems to be *prima facie* evidence to convict, his judgment cannot be questioned, for no other Court can judge of the credit due to witnesses which are not examined there (t).

* 416

* COPYHOLD.

Proof of title.
—Purchaser.

A COPYHOLD tenant proves his title by evidence of his own admittance, upon the surrender of a former tenant, by the production of the court-rolls, or by examined copies of them (u). These are the public rolls by which the inheritance of every tenant is preserved, and are the proceedings of the Manor-Court, which was formerly a court of justice (x). And they are evidence even for one who claims under the lord (y). And it is not necessary to produce a copy of the entries of the surrender and admittance stamped according to the stat. 48 Geo. III. c. 149 (z).

The legal title is completed by the admittance of the tenant; till the admittance, the legal title remains in the surrenderor, who is a trustee for the surrenderee (a). But after admittance, the title of the tenant has relation to the time of the surrender, as against all but the lord, and consequently after admittance the tenant may recover in ejectment on a demise laid on a day subsequent to the surrender, but before the admittance (b). A copy of the copyholder's admittance of 30 years standing is evidence, although not signed by the steward (c).

Title of tenants.

Where the tenant brings ejectment, it is necessary to

(s) *R. v. Davis*, 6 T. R. 178. Paley on Convictions, 37. *R. v. Reason*, 6 T. R. 376; where, on a conviction for having in his possession a private and concealed still for the purpose of distillation, the evidence was that the still was found in the garden of the defendant's house, and that the house was in the county, but there was no evidence that the garden was in the county, the conviction was held to be bad. *R. v. Chandler*, 14 East, 267.

(t) *R. v. Reason*, 6 T. R. 376. Paley on Convictions, 38. For the evidence in particular cases, see their respective titles, *Game*, &c.

(u) B. N. P. 247.

(x) Hil. Ass. 1701.

(y) *Doe v. Hellier*, 3 T. R. 162.

(z) *Doe ex dem. Bennington v. Hall*, 16 East, 208.

(a) 5 East, 132.

(b) *Holdfast v. Clapham*, 1 T. R. 600.

(c) *Dean of Ely v. Stewart*, 2 Atk. 44.

give some evidence to establish his identity with the party admitted (*d*).

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Where a surrender has been made to the use of one * for life, with remainder over to another, it is sufficient * 417 for the latter to prove the surrender, the admittance of the tenant for life, and his death; for the several interests constitute but one entire estate, and the admittance of the tenant for life ensures to the benefit of the remainderman (*e*). So if a copy-holder devise to one for life, remainder over in fee.

Formerly, the practice was for the owner to surrender to the use of his will, and upon this surrender the will operated as a declaration of the use, and not as a devise of the land. Hence, a devise of copyhold lands, or of customary lands which passed by surrender or admittance, did not require any attestation under the statute of frauds, nor any signature, unless the signature were rendered necessary by the terms of the surrender to the use of the will (*f*). But now by the stat. 55 Geo. III. c. 192, it is enacted, that the disposal of copyhold estates by will shall be effectual, without a previous surrender to the use of the will. The will must be produced and proved. Where copyhold rolls mention a surrender to the use of the tenant's last will, and the admittance of *A.* as devised under the will, it is no evidence of the title of *A.* without producing the will, because the land does not pass by surrender without the will, which must be shown as the best evidence of *A.*'s title (*g*).

Instructions for a will of copyhold lands, or of a customary estate passing by surrender and admittance, taken in writing by another in the presence and from the oral dictation of the party, although without the signature of the party, or any attestation, constitute a * sufficient devise of * 418 the copyhold estate, and a good will under the statute of wills (*h*). So also, short notes of a will taken by a lawyer from the testator's mouth, have been held to be a good.

(*d*) *Doe d. Hanson v. Smith*, 1 Camp. 196.

(*e*) 5 Mod. 306. Cro. Jac. 31. 1 Saund. 151. Com. Dig. Copyhold, C. 11.

(*f*) *Tuffnell v. Page*, 2 Atk. 37. *Carey v. Askew*, 2 Bro. Ch. Rep. 58. *Wagstaff v. Wagstaff*, 2 P. Wms. 258. *Doe d. Cooke v. Danvers*, 7 East, 299. 322.

(*g*) *Jenkins v. Barker*, per Tracy, 1705. Bac. Ab. Ev. F. 632.

(*h*) *Doe v. Danvers*, 7 East, 299. There had been in that case (which was before the stat. 55 Geo. III. c. 192) a surrender to the use of the will, and a probate had been granted in the ecclesiastical court.

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Title by will.

will in writing, although the testator died before they could be reduced to form (*i*). So is a draft of a will, the signing and publication of which have been prevented by the testator's death (*k*).

After the proof of the will, the claimant must prove the admittance of the testator, as also his own admittance, for till admittance, although after the surrender, the legal estate remains in the surrenderor, and descends to his heir (*l*).

Surrenders and admittances are proved either by the original entries on the court-rolls, or by copies (*m*). The surrender and admittance constitute but one entire conveyance, and the admittance has relation back to the time of the surrender, so as to vest the title in the surrenderee from that time (*n*).

Title of tenant
by descent or
custom.

* 419

Custom is the very essence of copyhold tenures, and frequently regulates the course of descent; but where * custom is silent, the descent is according to the course of the common law (*o*), and therefore, upon the death of the tenant, if no custom intervene, the legal estate descends to the heir at law (*p*), who by the general law of copyhold may maintain ejectment before admittance (*q*). His title is proved by evidence of the admission of the ancestor, his death, and the fact of heirship (*r*).

Heir at law.

Customary
heir.

If the party claim as customary heir he must show his title by proof of the custom (*s*). He must prove that the

(*i*) 1 Anderson, 34. See also 3 Leon. 79. 2 Keb. 128.

(*k*) *Wagstaff v. Wagstaff*, 2 P. Wms. 259. *Carey v. Askew*, 2 Bro. C. C. 58, cited by Ld. Ellenborough, 7 East, 324.

(*l*) *Roe v. Wroot*, 5 East, 137. *Roe v. Hicks*, 2 Wils. 15. Cro. Eliz. 148. 1 T. R. 600. Com. Dig. Copyhold, D. 2. *Wilson v. Weddell*, Yelv. 144. The probate is no evidence of the devise of a copyhold. *Jervoise v. The Duke of Northumberland*, 1 J. & W. 570.

(*m*) These must be duly stamped. *Doe d. Bennington v. Hall*, 16 East, 208. As to presumptive evidence of surrender, see *Wilson v. Allen*, 1 J. & W. 620.

(*n*) *Doe d. Bennington v. Hall*, 16 East, 208. *Holdfast d. Wollams v. Clapham*, 1 T. R. 600. *Vaughan v. Atkins*, 5 Burr. 2764. *Jefferies v. Hickes*, 2 Wils. 15. In the case of bargainor and bargainee, the estate is in the bargainee before enrolment. Com. Dig. Bargain and Sale, B. 9.

(*o*) *Doe v. Mason*, 3 Wils. 63. *Denn v. Spray*, 1 T. R. 466.

(*p*) *Denn v. Spray*, 1 T. R. 466.

(*q*) See *Doe v. Brightwen*, 10 East, 583.

(*r*) See tit. *Ejectment by Heir—Pedigree*.

(*s*) Co. Copyhold, 43. 3 Wils. 63.

usage has existed time out of mind (*t*); and such usages are construed strictly (*u*). The most usual evidence to prove the custom are the court-rolls of the manor. Entries by the homage on these rolls are evidence, as between tenants of the manor, to prove the mode of descent, although no instances can be proved in which persons have taken according to that course (*x*). So the customary of a manor handed down with the court-rolls from steward to steward, is evidence of the course of descent within the manor, although not signed by any one (*y*).

Entries on the rolls of a manor-court of the admissions of tenants in remainder, after the estate of the last tenant's widow, who held during her *chaste viduity*, are evidence of a custom for a widow to hold on that condition, so that ejectment may be maintained against her, as for a forfeiture on proof of incontinence, * although no instances * 420 are in fact stated on the rolls, or proved, that such a forfeiture had ever been enforced (*z*). Three instances on the rolls of husbands having been admitted as tenants by the curtesy, according to the custom, whose wives had been admitted during their lives, were held to be evidence to prove the custom, so as to entitle the husband of a deceased wife, who was heir at law, but who died before admittance, (having first borne a child to her husband, which died an infant) to hold for his life (*a*).

A single instance of a surrender in fee by a tenant in special tail of a copyhold, has been held to be evidence of a custom within the manor, to bar entails by surrender, although the surrenderor had not been dead 20 years, and although one instance was proved of a recovery suffered by a tenant in tail to bar the entail (*b*).

A paper signed by many deceased copyholders of a ma-

(*t*) 4 Leon. 242.

(*u*) 1 Roll. Ab. 624, pl. 1. 1 T. R. 466.

(*x*) *Roe v. Parker*, 5 T. R. 26.

(*y*) *Denn v. Spray*, 1 T. R. 466. 5 T. R. 26. 12 Vin. Ab. 215.

(*z*) *Doe d. Askew v. Askew*, 10 East, 520.

(*a*) *Doe v. Brightwen*, 10 East, 583. For the title of the wife as heir was complete without admittance, and that of the husband was also by operation of law; and the possession of the copyhold by the husband after the death of the wife, was referred to that title, and not to an adverse title, although he had been admitted after the death of the wife to hold to him, pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife in ejectment brought within twenty years after the husband's death.

(*b*) *Roe d. Bennett v. Jeffrey*, 2 M. & S. 92.

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IV.Title of the
lord.

To a fine.

* 424

Proof of for-
feiture,

and maintain ejectment to recover possession in the mean time (*p*). The court-rolls are evidence of the *proclamations* recited to have been made in them (*q*). But where on the death of a copyholder of inheritance the lord, after three proclamations to the heir to come in and be admitted, seized the estate into his hands, and afterwards granted it in fee to another, it was considered as an absolute seizure, and there being no custom to warrant it, it was held that it was irregular, and that the lord could not afterwards insist upon it as a seizure merely *quousque* (*r*).

The lord may recover from a copyholder the fine assessed by him upon admittance, not exceeding two years value of the tenement, although there be no entry of the assessment of such fine on the court-rolls, but * only a demand of such sum for a fine, after the value of the tenement has been found by the homage (*s*).

An assessment of a copyhold fine entered on the court-rolls as 100*l.*, cannot be reduced to 60*l.* by the lord's favour, without a new assessment (*t*); and therefore in such a case, where the lord sued for the fine, and the Jury found the annual value of the premises to be 30*l.*, and gave a verdict for 60*l.*, it was held that the lord could not retain his verdict for 60*l.* (*u*).

Where the lord insists that the tenant has committed a forfeiture by cutting down trees, and the tenant insists that they were cut down for the purpose of repairs, it is a question for the Jury whether they were cut down with a *bona fide* intention so to apply them (*x*), although in fact none have been actually so applied till the expiration of several months after they were cut down, and until after an action of ejectment has been brought by the lord for a forfeiture, and although many of them still remain unapplied, part of the premises being still out of repair (*y*).

(*p*) *Doe v. Jenney*, 5 East, 522.

(*q*) *Doe v. Hellier*, 3 T. R. 162.

(*r*) *Ibid.*

(*s*) *Ld. Northwick v. Stanway*, 6 East, 56.

(*t*) *Ibid.* 3 B. & P. 346.

(*u*) *Ibid.*

(*x*) *Doe v. Wilson*, 11 East, 56.

(*y*) The Jury found for the defendant; and there being no evidence that the trees were to be applied otherwise than for repairs, the Court refused to disturb the verdict. 11 East, 56.

COPYRIGHT. See *Piracy*.PART
IV.

CORPORATION.

A MISTAKE in the name of a corporation, who are plaintiffs, will not be material as a variance in evidence under the plea of the general issue. (1) Where the corporation were sued in the names of the mayor and * burgesses of the borough of Stafford, and it appeared in evidence from the charter that they were incorporated by the name of the mayor and burgesses of the borough of Stafford, in the *county of Stafford*, it was held that the variance could not be objected to except by plea in abatement; and that to make it pleadable in bar, it should appear that there is no such corporation (a).

Variance in
name.

* 425

Variance in
action by.

Where a party had granted to a corporation certain rights, it was held, in an action brought by the corporation against an assignee of the grantor, that the grant was evidence that the corporation was known by the name and description specified in the grant at the time of the grant, issue having been joined upon that fact (b).

The payment of rent to the bailiffs of a borough by the party, as tenant to a corporation, admits a tenancy from year to year, although a deed of demise has been prepared and executed by the bailiffs and some of the aldermen of the corporation, but has not been sealed with the corporation seal (c).

Evidence of
title.

The payment of rent by the predecessors of bailiffs of a corporation as bailiffs, is evidence of a tenancy by the corporation, and not by the bailiffs, and consequently an ejectment cannot be maintained against the two existing bailiffs (who have not paid rent) without notice to the corporation, in order to determine the tenancy (d).

(a) *Mayor & Burgesses of Stafford v. Bolton*, 1 B. & P. 40. Bro. Misno. 73. 22 Edw. IV. c. 34.

(b) *Mayor, &c. of Carlisle v. Blamire*, 8 East, 487; *vide supra*, Vol. I. p. 302. [See also *Dutchess Cotton Manufacturing Company v. Davis*, 14 Johns. 238.]

(c) *Wood v. Tate*, 2 N. R. 247; and see tit. *Ejectment*.

(d) *Doe v. Woodman*, 8 East, 228. See *Goodtitle v. Drew*, 11 East, 334. If in ejectment by a corporation a demise by deed be alleged, it need not be proved. *Furley v. Wood*, 1 Esp. C. 198. *Assumpsit* lies

(1) [See *Medway Cotton Manufactory v. Adams & al.* 10 Mass. Rep. 360.]

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IV.* 426
Actions
against.

An action of trespass or trover lies against a corporation (e). * In an action of trover for a detention by the servants of a corporation within the scope of their employment, (as where the agents of the Bank of England detain a number of Bank-notes) it appears to be unnecessary to prove that the detention was authorized by the corporation under their seal (f); at all events, an authority will be presumed after a verdict which finds the fact of a conversion by the corporation. So they may be guilty of a disseisin (g) or false return (h). •

Competency.*

Where a member of a corporate body can derive any personal advantage from the verdict, he is excluded by the general principle; accordingly, upon an issue on a *mandamus*, whether the election of common councilmen in a borough was not confined to persons of a particular description, it was held that one who fell within that description was not competent, since the limitation enhanced the value of his own situation (i).

But upon the question, whether to qualify a man to be a common councilman it was not necessary that he should be an inhabitant, and also have a burgage tenement, the Court held that one who was an inhabitant only was competent, because he came to disqualify himself (k).

* 427 Where an action was brought by a corporation on a custom, it was held that one who had acted in * defiance of the custom was not competent to disprove it (l).

A freeman is not competent to support a corporate title to rent, where the rent is reserved to the use of the corporation (m). The corporation of Kingston being lords of a manor, approved part of the common, reserving a rent to the use of

lies against a corporation whose power of drawing and accepting bills is recognized by a statute. *Murray v. East India Company*, 5 B. & A. 204.

(e) See the authorities, *Yarborough v. The Bank of England*, 16 East, 6.

(f) Ibid. And see tit. *Agent*; and *R. v. Bigg*, 3 P. Wms. 427. [See *Garvey v. Colcock*, 1 Nott & M'Cord, 231. *Bank of Columbia v. Patterson's Ex'ors*, 7 Cranch, 299.]

(g) Bro. Corp. pl. 24; and Lord Ellenborough's judgment, 16 East, 9. [See *Weston v. Hunt*, 2 Mass. Rep. 502.]

(h) 16 East, 7, and the cases there cited.

(i) *Stevenson v. Nevinson*, 2 Ld. Raym. 1353.

(k) Ibid. 1 Str. 583.

(l) *Company of Carpenters v. Hayward*, Doug. 360.

(m) *Burton v. Hinde*, 5 T. R. 174.

* See tit. *Interest*.

the corporation, and a freeman was held to be incompetent (n). But where the question was, whether the defendants had a right to be freemen, and it appeared that there were commons belonging to the freemen, an alderman was permitted to prove the negative, none but aldermen being privy to the making persons free (o). But where the members of a corporation cannot derive any private advantage from the subject matter which concerns the public only, they are competent witnesses; and therefore, although the mayor and commonalty of the city of London are entitled to tonnage on coal, but the mayor and sheriffs have the toll for the benefit of the corporation at large, and no particular individual is benefited by it, the freemen are competent witnesses to support the privilege (p). Where a freeman of a corporation is interested, the usual mode of removing the objection is by disfranchisement, but it is sufficient if he release his right to the corporation (q) (1)

Competency.

As to the admissibility of corporation-books, see Vol. I. p. 298; and see also below tit. *Inspection*.

* COUNTER-PLEA.

* 428

UPON a counter-plea of a former conviction, in order to take away the prisoner's benefit of clergy, it is necessary to produce the record of the former conviction from the proper place of deposit, or an examined copy of it, or a certificate authorized by some statute (r). And, 2ndly, to prove the identity of the prisoner (s).

The prisoner cannot take advantage of any defect in the first indictment (t).

(n) Ibid.

(o) *R. v. Phillips & Archer*, per Lee, C. J. B. N. P. 289.

(p) *R. v. Mayor, &c. of London*, 2 Lev. 281. 1 Vent. 351. 1 Vern. 254. 2 Vern. 317. 4 Burn's Ecc. Law. 95. *King v. Carpenter*, 2 Show. 47. See also *Weller v. Governors of the Foundling Hospital*, Peake's C. 153.

(q) *T. Jones*, 116. 2 Lev. 236. A judgment of disfranchisement on a *scire facias* in the Mayor's Court, and two *nihilis* returned, the witness not having been summoned, and knowing nothing of his disfranchisement, does not render him competent, the corporation being interested. *Brown v. Corporation of London*, 11 Mod. 225; and see *The Sadler's Company v. Jones*, 6 Mod. 166.

(r) *R. v. Scott & others*, Leach, 445. See tit. *Certificate*.

(s) Ibid. *R. v. Murphy*, Leach, 117.

(t) *R. v. Scott*, Leach, 445.

(1) [See Digest of cases, as to the competency of corporators as witnesses, in Peake on Evidence, Ch. III. sect. 3.]

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By the stat. 4 Hen. VII. c. 13, if any person at the second time of asking his clergy, because he is within orders, hath not ready his letters of orders, or a certificate of his ordinary, the Justices shall allow him a day to bring in the same.

COUNTY.

In general, by the common law, it is necessary to prove the offence to have been committed within the county or division where the indictment is found, and for which the Jurors are returned.

By the 5 & 6 Edw. VI. c. 10, upon an indictment for homicide where the death happens, the Jurors may inquire as to the stroke, though given in another county. And by a number of other statutes, noticed in their proper place, offences under particular circumstances may be inquired of in other counties than those in which they are committed (u).

* 429 The common-law rule, that the offence must be proved to have been committed in the county where the * indictment is laid, does not exclude collateral evidence, although arising in another county, tending to show the commission of the crime in the first. Thus, proof of possession of stolen goods by the prisoner in one county, is evidence on a charge of his having stolen them in another (x). And in the case of treason, it seems, that after evidence given of the treason in the county in which it is laid, evidence may be given of other instances of the same crime committed in another county, as explanatory of the acts committed in the first (y). Thus where a levying war is laid as the treason, the levying war in another county is evidence to show the nature of the acts in the county in which the treason is laid (z). So in the case of conspiracy, evidence of acts done in any other county may be adduced tending to prove the existence of a conspiracy, provided an overt act be proved in the county in which the indictment is laid (a). See further tit. *False Pretences*.—*Forgery*.—*Larceny*, &c.

(u) See Stark. Crim. Plead. C. 1.

(x) *Butler's case*, East's P. C. 776. Although the contrary has been held, *Evans's case*, East's P. C. 776, per Holt, C. J.

(y) Kel. 33. 4 St. Tr. 410. *R. v. Hensey*, 1 Burr. 650. 2 Haw. c. 46, s. 183.

(z) Cases of *Damaree*, *Purchase* and *Willes*, 8 St. Tr. 218. *Deacon's case*, Fost. 8.

(a) *R. v. Britac*, 4 East, 164. *R. v. De Berenger & others*, 3 M. & S. 67.

COVENANT.

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The evidence in an action of covenant is closely confined by the nature of the pleadings; the plaintiff is bound to show his title, and to point out the particular breaches of covenant of which he complains, and the defendant is obliged to show the grounds of his defence specially upon the record. The most usual pleas are the

- * 1. Plea of *non est factum*. * 430
- 2. That the deed was obtained by *duress*.
- 3. Denial of the plaintiff's performance of a *condition precedent*.
- 4. Denial of the *breach* of covenant.
 - { not to assign without license.
 - { for quiet enjoyment.
- 5. Of entry and *eviction*.
- 6. Denial of plaintiff's title as *assignee*.
- 7. Denial of the defendant's liability as *assignee*.
- 8. A Release (*b*).

Upon the plea of *non est factum* the plaintiff must produce the deed, if pleaded with a profert, and prove the execution in the usual way (*c*). If there be no other plea on the record, all the other averments stand admitted; and after proof of the defendant's execution of the deed, nothing remains on the part of the plaintiff but to prove the amount of his damages (*d*). It may be observed, that the deed itself, when proved, is evidence against the defendant who has executed it, of all the facts recited in the deed. If, for instance, a lease describe the demised land as meadow-land, this is evidence that it was so at the commencement of the term (*e*). But if the defendant by his plea admit the execution of the deed, he admits so much of the deed as is stated in the declaration, but no more; and if the plaintiff seeks to prove some other recital of the deed not specified in the declaration, he must prove the execution of the deed (*f*).

If there be any material variance between the declaration and the deed proved, it will be fatal under this * plea. * 431
The declaration stated, that by a certain indenture it was

(b) See tit. *Deed*.—*Release*.

(c) See *Proof of Deed*.

(d) B. N. P. 172. *Michael v. Scockwith*, Cro. Eliz. 120.

(e) *Smith v. Woodward*, 4 East, 585.

(f) *Williams v. Sills*, 2 Camp. 519. *Watson v. King*, 4 Camp. 272.

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sheriff who has seized the lease under a *fiery facias* (*u*); or where the assignees under a commission assign the bankrupt's lease (*x*); or where, as it seems, executors dispose of the testator's term (*y*); otherwise, where an assignment is effected in fraud of the covenant, as by means of a warrant of attorney to *confess a judgment, in order that the judgment-creditor may take the lease in execution (*r*). Where the covenant is not to assign, set over, or otherwise let the demised premises, it is not sufficient to show that a stranger is in possession of the premises, for he may have been a tortious intruder (*z*). But where the covenant is not to aliene, assign, or part with the possession, it seems to be sufficient to prove that a stranger is (*a*) in possession.

Breach.—
Quiet enjoyment.

Where the plaintiff declares on a covenant for quiet enjoyment (*b*), if the covenant be *general*, he must show in his declaration that the eviction was made by a person claiming by a legal title inconsistent with his own (*c*); (1) and his proof must correspond with such averment. If the eviction has been obtained by means of legal process, the plaintiff should prove the execution and judgment, and show how it was obtained. Where the covenant is particular against interruption or eviction by the lessor or grantor, or some other specified person, the plaintiff need not allege, and of course need not prove, the title of the party interrupting or evicting him (*d*) (1).

(*u*) *Doe ex dem, Mitchinson v. Carter*, 8 T. R. 57.

(*x*) *Doe v. Bevan*, 3 M. & S. 353. 3 Wils. 237. *Fox v. Swan*, Sty. 483.

(*y*) *Seers v. Hind*, 1 Ves. jun. 295.

(*r*) *Doe v. Carter*, 8 T. R. 300.

(*z*) *Doe v. Payne*, 1 Starkie's C. 86.

(*a*) 4 Taunt. 766; but see *Ld. Ellenborough's* observations in *Doe v. Payne*, 1 Starkie's R. 87.

(*b*) This covenant runs with the land, and binds the assignees; and there is no difference between an assignment of an inheritance and a term for years. *A.* devised for a term to *B.*, who assigned his interest to *C.*, and covenanted with him and his assigns for quiet enjoyment; *C.* demised to *D.*, who was evicted for a forfeiture by *B.* before the assignment to *C.*; and it was held that *D.* might maintain the action of covenant against *B.* *Lewis v. Campbell*, 3 Moore, 35. And see *Thursby v. Plant*, 1 Will. Saund. 241, b, [*Binney v. Hann*, 3 Marsh. 324.]

(*c*) *Tisdale v. Sir W. Essex*, Hob. 34. *Foster v. Pierson*, 4 T. R. 617. *Buckley v. Williams*, 3 Lev. 325.

(*d*) *Perry v. Edwards*, 1 Str. 400. *Lloyd v. Tomkies*, 1 T. R. 671.

(1) [See *Yelv.* 30, note (1), and cases there collected. *Dalison*, 56. pl. 8—110, pl. 2. *Nash v. Palmer*, 5 M. & S. 374. *Greenby v.*

* The plaintiff must show some act done, or disturbance of his possession, which amounts to a breach of the covenant. A mere verbal disturbance by prohibiting the tenant of the covenantee from paying rent will not amount to a disturbance (e) (1).

In support of this plea in excuse for the non-performance of a covenant, the defendant must prove such an entry or eviction as were sufficient to prevent the performance of the covenant. Plea of entry and eviction.

On a covenant to repair the dwelling-house, proof under this plea of an entry into in the back-yard would not be sufficient, unless it appeared that this entry wholly prevented the defendant from repairing the house (f).

Where the plaintiff declares as assignee (g), and his title is put in issue by one or more of the defendant's pleas, he must prove his title as alleged, whether as assignee of the reversion by proof of the due execution of the assignment (h), as assignee of the estate of a bankrupt by proof Plea denying title of plaintiff.

(e) 1 Brownl. 81.

(f) B. N. P. 165.

(g) Before the stat. 32 Hen. VIII. c. 34, the action of *debt* for rent lay for the assignee of the reversion at common law, and the action being founded on privity of estate was local (*Walker's case*, 3 Rep. 22, b. 4 Mod. 81, *Glover v. Cope*. 3 Mod. 338; 1 Will. Saund. 241, c. in note). The effect of the above statute was to transfer a privity of contract, and to enable the assignee of the lessor to maintain covenant against the lessee (*Thursby v. Plant*, 1 Will. Saund. 237). The lessor might at common law maintain debt or covenant for rent, or not repairing, or other covenant running with the land; but the action was local, as founded in privity of estate (*Walker's case*, 3 Rep. 22. 5 Hen. VII. 19, a. 1 Will. Saund. 241, c. in note); and consequently such an action by the assignee of the reversion against the assignee of the lessee is also local, and must be brought in the county where the land lies. Ibid. [*Lienow v. Ellis*, 6 Mass. Rep. 331.]

(h) See tit. *Deed*.

Wilcocks, 2 Johns. 1. *Folliard v. Wallace*, 2 Johns. 395. *Kent v. Welch*, 7 Johns. 258. *Patton v. Kennedy*, 1 Marsh. 389. acc. A covenant for quiet enjoyment extends only to disturbances, &c. made by virtue of rights existing at the time the covenant is made, and not to those afterwards acquired. *Ellis & al. v. Welch*, 6 Mass. Rep. 246.]

(1) The covenant for quiet enjoyment goes to the possession and not to the title, and is broken only by an entry and expulsion from the possession, or some actual disturbance of it. *Waldron v. McCarty*, 3 Johns. 471. *Kortz v. Carpenter*, 5 Johns. 120. See also *Van Slyck v. Kimball*, 8 Johns. 198. In North Carolina, a recovery in trespass *quare clausum fregit* against the grantee, is sufficient evidence of a breach of the covenant for quiet enjoyment. *Williams v. Shaw*, 2 Taylor, 197.]

PART
IV.

of the several steps of bankruptcy, and of the assignment (i), as heir (k) of the covenantee, * or as his devisee or his executor, according to the circumstances of the case.

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Where the action is by an assignee of the reversion on a covenant to pay rent, and the assignment is traversed, the plaintiff may either prove a conveyance duly and regularly made, or a payment of rent to him by the defendant (a).

Plea denying
derivative lia-
bility of de-
fendant.

So if the defendant, by one or more pleas, deny that he is bound by the covenant, the plaintiff must prove the liability as assignee. Upon a covenant which runs with the land, proof that the defendant is heir will support a declaration which charges him generally as assignee (l).

Where the plaintiff declared against the assignees under a commission of bankrupt against the lessee, and averred in the usual form that the estate, right, title, &c. of the lessee came to the defendants by assignment thereof duly made, by virtue of which said assignment they entered into the demised premises, and were possessed thereof for the residue, &c. it was held that the averment was not satisfied by proof that the assignees had advertised the lease for sale, (without stating themselves to be the owners), and without taking any possession of the premises (m). But it was said by Lord Ellenborough, that if a bidder had been found, and the defendants had accepted the bidding, that would have been evidence of their assent to take to the premises. And where the assignees of a bankrupt paid rent, not as tenants, but for the purpose of preventing a distress upon the premises where the bankrupt's goods remained, but under a protest that they did not mean to adopt the term, unless * upon a trial made it should be found to be valuable, and the premises were put up to sale with the plaintiff's concurrence, it was held that they were not liable to covenant for rent, although they had kept the keys of the premises for four months, no application having been made to them to deliver them up (n).

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Evidence on
plea denying
defendant's
liability as as-
signee.

Proof of possession by the defendant, or of payment of

(i) See tit. *Bankruptcy*.

(k) See the several titles *Devisee, Executor, Heir, &c.*

(a) Peake's Ev. 267. [446, Norris's ed.] *Doe v. Parker*, there cited.

(l) *Derisley v. Custance*, 4 T. R. 75.

(m) *Turner v. Richardson* and another, 7 East, 335. See also 1 Esp. C. 234. Peake's C. 238. 2 Starkie's C. 209.

(n) *Wheeler v. Braham*, 3 Camp. 340. [See *Hanson v. Stevenson*, 1 B. & A. 303.]

rent, is *prima facie* proof that he is assignee. But still the defendant may show that the title is in another, and prove that he is under-tenant only, even though the reversion of but one day be left in the original lessee (*o*). So the devisee of the equity of redemption, the legal estate being in a mortgagee, is not liable to a covenant running with the land (*p*). But an actual entry or possession is not essential to render the assignee of the whole term of a lease liable to the covenant for payment of rent (*q*).

If the plaintiff charge the defendant through a variety of deeds, instead of charging him generally by virtue of divers mesne assignments, and these be put in issue by the plea, the plaintiff must prove the deeds as stated (*r*).

Under the plea of release, (which must be by deed), it must be proved that the release was executed subsequently to the breach of covenant. Release.

The evidence peculiar to the pleas of Accord and Satisfaction, Infancy, is treated of elsewhere under the proper titles.

* COVERTURE. See *Husband and Wife*.

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CRIMINAL CONVERSATION.

THE plaintiff, in an action for criminal conversation with his wife, must prove, 1st. The marriage; 2dly. The fact of adultery; 3dly. It is usual to adduce evidence in aggravation of damages.

1st. *His marriage*.—The plaintiff must prove a marriage in fact; proof of cohabitation and reputation are insufficient (*s*) (1). But this is the only instance in civil cases in which such evidence is insufficient, and the exception in this case is founded partly on the consideration that the proceeding is of a penal nature, and partly as a rule of policy and convenience, to prevent the setting up of pre-Marriage.

(*o*) *Holford v. Hatch*, Doug. 183. *Hare v. Cater*, Cowp. 766.

(*p*) *Mayor, &c. of Carlisle v. Blamire*, 8 East, 487.

(*q*) *Williams v. Bosanquet*, 1 B. & B. 238, overruling *Eaton v. Jaques*, Doug. 454. See *Stone v. Evans*, Woodfall's L. & T. c. 3, s. 15. Co. Litt. 46, b. 1 Ld. Raym. 367.

(*r*) 3 B. & P. 461.

(*s*) *Morris v. Miller*, 4 Burr. 2057. 1 Bl. Rep. 632. The reason assigned by Ld. Mansfield is, that otherwise parties might be liable to such actions on evidence made by the plaintiff who brings the action.

(1) [*Kibby v. Rucker*, 1 Marsh. 391: acc.]

PART
IV.

Marriage.

tended marriages for bad purposes (t). Even the defendant's admission of the fact has been said to be insufficient (u).

X The defendant was surprised at a lodging with the plaintiff's wife, and on being asked where Major Morris's wife was, he answered, "In the next room;" this was holden to be insufficient, for it was nothing more than a confession of the reputation that she went by the name of the plaintiff's wife, and not a confession of the fact of marriage (x).

* 439 * Where, however, the defendant has seriously and solemnly recognized the marriage, it seems, upon principle, that his acknowledgment is admissible evidence of the fact (y).

Since the action is against a wrong-doer, it seems to be sufficient to prove a marriage according to any religion, as in the case of Anabaptists, Quakers, and Jews (z). The

(t) 4 Burr. 2057. *Birt v. Barlow*, Doug. 171.

(u) Peake's L. Ev. 358. *Birt v. Barlow*, Doug. 171. But see tit. *Admission.—Polygamy*.

(x) *Morris v. Miller*, 4 Burr. 2057. B. N. P. 27. In strictness, however, and upon general principles, it is difficult to exclude such evidence from the consideration of the Jury. To rely upon such evidence to prove a fact, the circumstances of which are peculiarly within the plaintiff's own knowledge, and consequently where better proof might be had, and to substitute for it the mere declaration of the defendant, which may be founded on nothing more than the mere assertion of the parties themselves, would fully warrant the highest degree of suspicion and jealousy, so as to induce the Jury, on the recommendation of the Court, to require better evidence. Still cases may occur where evidence resting on the same foundation, but merely stronger in degree, would be not only evidence, but almost conclusive of the fact. Suppose, for instance, that in some other proceeding, where it was necessary to prove the same marriage, the present defendant had made an affidavit setting forth all the circumstances of the marriage, and that he was himself present at the ceremony, could it be said that such evidence would not be most cogent to prove the fact of marriage? And yet it would be evidence of the same class with the former, and its admissibility would rest on no other basis than any other assertion made by the defendant would do. (See 2 Wils. 399; & *supra*, 36.) These observations, which are made for the purpose of preserving the entirety of a general principle, regard the theory rather than the practice in such cases; for it is quite clear that a Jury would be fully warranted in refusing to find the fact of marriage upon evidence so slight, when evidence so much better might be adduced.

(y) See the last note, & *supra*, 36.

(z) B. N. P. 28, cites *Woolston v. Scott*, per Denison, J. at Thetford, where the plaintiff was an anabaptist, and recovered 500*l*. See *Ganer v. Lady Lanesborough*, Peake's C. 17. But it was for-

evidence to prove a marriage, in fact, which will be more fully considered hereafter (a), usually consists in proving an examined copy of the register, and in the testimony of some one who was present at the ceremony, or who can identify the parties, * by evidence of their signatures in the register (b). So the identity may be proved by other circumstances sufficient to satisfy the Jury; such as that a wedding-dinner was given upon occasion of the marriage; that the lady left her house for the purpose of being married, and afterwards was known and addressed by her husband's name (c). * 440

2dly. *The fact of adultery.*—The evidence of this fact, which, from its very nature, is usually circumstantial (d), must be sufficient to satisfy the Jury that an adulterous intercourse has actually taken place (1). Proof of familiarities, however indecent, is insufficient, if there be reason to apprehend, from the fact of the parties being interrupted, or on any other circumstance, that a criminal conversation has not actually taken place. Fact of adultery.

The nature of the proofs upon this head are too obvious to require specification. They usually consist in evidence of the elopement of the parties; their passing as man and

merly doubted whether it was not necessary to prove that the marriage was celebrated according to the rites of the church.

(a) *Tit. Marriage—Polygamy.*

(b) In consequence of an expression by Mr. J. Buller, in the case of *Birt v. Barlow*, a doubt has been raised whether, if the original register be produced, the subscribing witnesses ought not to be called. This doubt seems to be wholly destitute of foundation: the object of such proof is not to bind a party by the contents of an instrument, but merely to prove the identity of the parties; and therefore the objection does not arise that evidence is adduced to authenticate the instrument different from that which the parties have themselves constituted.

(c) See *Birt v. Barlow*, Doug. 171.

(d) In the *Causes Celebres*, tom. 18, p. 451. The law of *England* on this subject is thus caricatured, “*Les preuves de l'Adultere des femmes sont tres difficiles: il faut que le mari puisse prouver qu'il a, comme dit Madame Pernelle du Tartuffe vu de ses propres yeux: autrement il n'est pas ecoute.*”

(1) The same evidence that would warrant a divorce for adultery would probably be sufficient to support an action for criminal conversation. With respect to the former, Sir William Scott says, direct evidence of the fact is not required—but the rule is, that there must be such proximate circumstances proved, as on their own nature and tendency satisfy the legal conviction of the court, that the criminal act has been committed. *Williams v. Williams*, 1 Haggard's Rep. 299. *Elwes v. Elwes*, *ibid.* 278. See *Torre v. Summers*, 2 Nott & M'Cord, 267.]

PART
IV.

Fact of adultery.

*** 441**

wife at the inn ; of the season, frequency and privacy of their meetings, and of all other circumstances attending their intercourse, and indicating the nature of it (1).

Where a discovery has been made by a servant, it is * of importance to show that it was promptly communicated to the party injured ; if it was not made till after a quarrel or dismissal from the service, or after a long interval, the evidence labours under great suspicion.

Letters written by the defendant to the wife frequently afford strong evidence of the nature of their intercourse.

Where the Statute of Limitation has been pleaded so as to exclude the recovery of damages for adulterous intercourse, which took place a greater distance of time than six years previous to the commencement of the action, it has been held that anterior acts of adultery are evidence for the purpose of showing the nature of the connection which subsisted within the six years (d).

The confession of the wife will be no evidence against the defendant (e) ; but a discourse between the wife and the defendant is evidence (f), as also are letters written by the defendant to the wife.

Damages.

*** 442**

3dly. *Evidence of damage.*—There is no case in which the damages depend more upon the particular circumstances of the case than in the action for adultery. The injury to the husband in the dishonour of his bed—the alienation of his wife's affections—the destruction of his domestic comforts, and the suspicion cast upon the legitimacy of her offspring, is usually visited with considerable damages where there has been no fault on the part of the plaintiff. It is a trite observation, that such a loss does not admit of any pecuniary estimate or compensation ; this is true : but, on the other hand, such damages, if not an adequate retribution, constitute the only one which the law can award ; and the impossibility of giving * full redress is a bad reason for giving none, and for depriving morality of one of its safeguards.

Evidence in aggravation.

Evidence in aggravation usually consists in showing the rank and quality of the plaintiff ; the condition of the

(d) *Duke of Norfolk v. Germaine*, 8 St. Tr. 35.

(e) B. N. P. 28. *Baker v. Morley*, Guildhall, 1739.

(f) *Ibid.*

(1) [When the injury is stated to have been committed within certain days, proof of improper freedom must first be given within the limited period, before evidence of the act at a different time can be received. *Gardner v. Madeira*, 2 Yeates. 466.]

defendant; that he was received by the plaintiff as a friend or relation; that he was dependent on the plaintiff; that he was a man of fortune and condition; that the plaintiff and his wife, previous to the seduction, lived upon terms of affection and domestic comfort. For this purpose general evidence (*g*) is admissible by any witness acquainted with the family, who can testify to their demeanor and conduct, and to the terms on which they lived. Letters written by the wife to the plaintiff previous to any suspicion of a criminal intercourse are also admissible with the same view; but, in order to obviate all suspicion of collusion in such case, it is essential to give reasonable evidence to show that the letters had existence at the time (*h*), as by proof that the wife, at the time of writing, showed or read them to a witness (*i*); and it is desirable, under such circumstances, to explain the reason of the wife's living apart from the husband at the time when she wrote such letters (*k*). But it does not appear to be essential to give such explanatory evidence where there is no ground to suspect collusion (*l*).

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IV.

Damages.
Evidence in
aggravation.

The opinion which a witness has formed of the wife's affection for her husband, from the anxiety which she has expressed for him, and her mode of speaking of * him during his absence, is also evidence to the same end (*m*). * 443

Proof of a settlement, and provision for the children, is also evidence in aggravation (*n*).

The representation made by the wife to her husband on the eve of her elopement is admissible, as part of the *res gestæ*, in order to remove all suspicion of connivance on the part of the husband (*o*).

The plaintiff cannot go into general evidence of the wife's good conduct until an attempt has been made to impeach it (*p*).

(*g*) *Ld. Ellenborough*, in *Trelawney v. Coleman*, 1 B. & A. 90, is reported to have said, what the husband and wife say to each other is evidence to show their demeanor and conduct. But *qu.* whether the evidence in such case ought not to be general.

(*h*) *Trelawney v. Colman*, 2 Starkie's C. 191. 1 B. & A. 90. *Edwards v. Crock*, 4 Esp. 39.

(*i*) *Ibid.* *Edwards v. Crock*, 4 Esp. C. 39.

(*k*) *Trelawney v. Colman*, 2 Starkie's C. 191.

(*l*) *Ibid.* (*m*) *Ibid.*

(*n*) B. N. P. 27.

(*o*) *Hoare v. Allen*, 3 Esp. C. 276.

(*p*) See tit. *Character*.

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IV.

Evidence for
defendant in
bar.

The defendant, under the general issue, will be entitled to enter into any evidence to disprove the marriage, or the fact of adultery, or to show that the plaintiff has sustained no injury in law or fact. It has, in one instance, been held that the defendant might prove the plaintiff's connection with other women after his marriage, in bar of the action (q); but in a subsequent case (r), it was decided that the fact went in mitigation of damages only.

It was laid down by Ld. Mansfield as clear law, that if a woman be suffered to live as a prostitute with the privity of her husband, and a man be thereby drawn into criminal conversation, no action will lie; it a damage without an injury. But if it be not with the husband's privity, it will only go to the damages, let her be ever so profligate. And Pratt, C. J. declared himself to be of the same opinion, in a similar case, about the same time (s).

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Defence,

* So if the criminal connection can be shown to have taken place with the husband's privity and consent, the action will not be maintainable (t); for a plaintiff cannot be allowed to recover damages in a court of justice grounded on his own turpitude; and besides, the maxim applies *volenti non fit injuria*.

In one case it was held (u), that proof that the husband and his wife were parted upon articles of separation, was a bar to the action; but in a later case, the propriety of that decision has been doubted. And at all events, where the husband does not, by the articles of separation, renounce all future intercourse and society with his wife, and all assistance to be derived from her in respect of the education of his children, the separation will not be a bar to the action (x) (1).

(q) By Ld. Kenyon, in *Wyndham v. Ld. Wycomb*, 4 Esp. C. 16. *Strutt v. Marquis of Blandford*, there cited.

(r) *Bromley v. Wallace*, 4 Esp. C. 237.

(s) *Smith v. Allison*, Sittings at West. Cor. Ld. Mansfield, after Trin. 5 Geo. III. B. N. P. 27. But in a previous case of *Cibber v. Sloper*, (per Lee, C. J. cited B. N. P. 27,) it was holden that the action lay, although the privity and consent of the husband to the defendant's connection with the wife were fully proved.

(t) B. N. P. 27. *Hodges v. Wyndham*, Peake's C. 39. *Duberley v. Gunning*, 4 T. R. 655.

(u) *Weedon v. Timbrel*, 5 T. R. 357. [See *Bartelot v. Hawker*, Peake's C. 7.]

(x) *Caulfield v. Chambers*, 6 East, 244.

(1) [In Pennsylvania, the husband cannot support this action, after an agreement of separation made with his wife,—if such agreement be voluntary on his part, and not constrained. *Fay v. Derstler*, 2 Yeates, 278.]

The defendant may show, in mitigation of damages, that the wife had before eloped, or had been connected with others; that she had borne a bastard before marriage (*y*); that she had been a prostitute previous to her connection with the defendant (*z*); that she was a woman of loose conduct, and notoriously *bad character; that she made the first overtures and advances to the defendant (*a*); that his means and expectations are inconsiderable.

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IV.

Evidence for
defendant in
mitigation.
* 445

Evidence aimed against the previous character and conduct of the wife is obviously of a dangerous nature, and not to be resorted to, unless it be of a strong and decisive cast; a failure in the attempt to affect the character of the wife at a time previous to the criminal intercourse, would probably increase the amount of the damages very considerably.

CUSTOM.

CUSTOMS, with a view to the present object, may be classed, 1. As the *general* and ancient customs of the realm; 2. Particular *local* customs; 3. *Mercantile* customs which are not part of the ancient law, but have been ingrafted into it; 4. Customs, or rather *usages*, which are so common and prevalent as to afford a presumption of their adoption as matter of contract in particular instances.

Different kinds
of.

It would be foreign to the present purpose to observe upon the first of these classes. Such customs constitute a large portion of the *lex non scripta*, or common law of the land. These are not matter of evidence; where a doubt arises concerning them, it is to be resolved by the Judges in the several courts of justice. They are, to use the language of Sir W. Blackstone, the depositaries of the laws, the living oracles who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land (*b*).

General cus-
toms.

(*y*) *Roberts v. Malston*, per. Willes, C. J. Hereford, 1745. B. N. P. 296.

(*z*) B. N. P. 27. But it is there also laid down that the defendant cannot give evidence of the general reputation of her being or having been a prostitute, for that may have been occasioned by her familiarity with the defendant; though, perhaps, having laid a foundation, by proving her being acquainted with other men, such general evidence may be admitted.

(*a*) *Elsam v. Faucett*, 2 Esp. C. 562. 1 Sel. N. P. 25. [See *Torre v. Summers*, 2 Nott & M'Cord, 267.]

(*b*) 1 Bl. Comm. 69.

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IV.

Local customs.

* 446

Andly. Particular customs which affect the inhabitants of particular districts.

The customs of *Gavelkind* and *Borough English* are * noticed by the law without proof (c), but other private customs must be pleaded and proved. The customs of London differ from others in point of trial. If the existence of the custom be brought in question, it is not tried by a Jury, but by certificate from the lord mayor and aldermen by means of the recorder (d). Unless the corporation be interested in the custom, as a right of taking toll, and then they are not allowed to certify in their own behalf (e).

In order to establish a particular local custom before a Jury, it must be shown that it has existed so long that the memory of man runneth not to the contrary; for if it appear to have originated within time of legal memory, that is, since the reign of Richard I., it is not a good custom (f).

Next it must appear, that the usage has been *continued*, for if there be any chasm or interruption of the right within the time of legal memory, there must have been a revival or beginning within the time of legal memory, which will avoid the custom. But an interruption in the possession or enjoyment only, though for 10, or 20 years, will not destroy the custom; as, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, although they do not use it for 10 years, it only becomes more difficult to be proved; but if the *right* be discontinued, though but for a day, the custom is at an end (g). It must also have been peaceable, and acquiesced in, and not subject to contention and dispute; for since customs originate in common consent, * their being immemorially disputed at law, or otherwise, is a proof that such consent was wanting.

Local custom.

Customs must also be reasonable, or rather, taken negatively, must not be unreasonable (1), which according to Sir Edward Coke (h) is not to be always understood of

(c) Co. Litt. 175.

(d) Cro. Car. 516.

(e) Hob. 85.

(f) 1 Bl. Comm. Introd. s. 3. 2 Roll. 269, l. 10. 45. See tit. *Prescription*.

(g) 1 Bl. Comm. Int. s. 3.

(h) 1 Inst. 62.

(1) [See *Jordan & al. v. Meredith*, 3 Yeates, 318. *Freary & al. v. Cooke*, 14 Mass. Rep. 488. *Gallatin v. Bradford*, 1 Bibb, 209.]

every unlearned man's reason, but of artificial or legal reason, warranted by authority of law ; upon which account, a custom may be good, though the particular reason of it cannot be assigned, for it sufficeth, if no good legal reason can be assigned against it (*i*).

To constitute a legal custom, it is not only necessary that its existence should be established by evidence, and also that it should be reasonable, but that it should be certain, compulsory, and consistent (*k*).

Requisites of.

But as these considerations are purely questions of law and not of evidence, it would be foreign to the present subject to consider them here.

The usual evidence of custom consists in acts of usage within the knowledge and experience of living witnesses, upon which alone, and without the aid of more remote evidence of a documentary or traditionary nature, the presumption of a custom may be built.

It consists also in the proof of court-rolls, customaries, and other ancient writings, the nature and force of which, in the proof of customary descents and tenures, have already been considered (*l*); and also in reputation and traditionary declarations, and in such decrees, judgments, and other documents as fall within the general principle on which reputation is admissible (*m*).

* With respect to reputation and traditionary declarations, as applied to the proof of customs, some rules are to be observed which have already been noticed.

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Proof by reputation.

1st. They must be supported by evidence of the exercise of such right or custom (*o*); 2ndly, must be of a public nature (*p*); 3rdly, derived from persons likely to know the facts (*q*); 4thly, must be general (*r*); 5thly, must be free from suspicion (*s*).

The entry by homage on the court-roll is evidence to By court-rolls.

(*i*) 1 Bl. Comm. Int. s. 3. 1 Inst. 62.

(*k*) See 1 Bl. Comm. 78, 9.

(*l*) See *Copyhold*; and Vol. I. p. 66.

(*m*) B. N. P. 295. *R. v. Eriswell*, 3 T. R. 709. *Morewood v. Wood*, 14 East, 327, n.

(*o*) Vol. I. p. 59.

(*p*) Vol. I. p. 60. *Weekes v. Sparke*, there cited, 1 M. & S. 679. B. N. P. 295. Because, according to Ld. Kenyon, all mankind being interested in the subject, it is to be presumed that they will be conversant with and discourse together about it, which cannot apply to private prescription. 14 East, 327, n.

(*q*) Vol. I. p. 62.

(*r*) Vol. I. p. 63. B. N. P. 295.

(*s*) Vol. I. p. 64.

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IV.

Admissibility
and effect in
evidence.

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Although the custom of one manor be not evidence to prove the existence of a similar custom in a different one, yet the case is different where the question concerns a particular branch of trade (*q*), for then it seems that the manner of carrying on trade at one place, may be evidence of the mode of carrying it on in another. Thus in an action on a policy on a ship on a fishing voyage to Labrador, evidence of the custom in the Newfoundland trade was admitted to prove that there had been no unnecessary delay in unloading the cargo (*r*).

Where an agreement between parties is general or doubtful, the custom and usage of the country in which it was made are frequently evidence of the terms upon * which the parties meant to contract; for in the one case, their silence raises a presumption that they intended to be governed by the usual course of dealing, in such cases, prevalent in the neighbourhood; and in the latter it is reasonable to suppose that they intended to use the dubious term in that sense in which it was generally understood, either in the neighbourhood, or in the particular course and habit of dealing to which the agreement relates. Thus a tenant from year to year generally is bound to manage the land in a husband-like manner; according to the custom of the country (*s*). So, although in general six months notice is necessary to determine a tenancy from year to year of lands, a longer may be necessary, or a shorter sufficient, according to the custom of the country, without any express contract to that effect (*t*). So where the terms of the hiring of a servant are doubtful, they may, it seems, be explained by the custom as to hiring servants in that country (*u*).

So, where the tenant's time of entry is doubtful, the usage and custom of the country as to the time of entry is evidence (*x*). And even where the contract is special, and by deed, evidence of custom is admissible to establish rights

(*q*) Per Buller, *J. Noble v. Kennoway*, Doug. 513.

(*r*) *Noble v. Kennoway*, Doug. 510.

(*s*) *Powley v. Walker*, 5 T. R. 373.

(*t*) *Navestock v. Standon Massey*, Bur. S. C. 719. Bott, 238. But in that case it seems to have been unnecessary to resort to such evidence in order to establish the settlement; and Aston, J. did not put the case on that footing. And see *R. v. Skiplam*, 1 T. R. 490.

(*u*) *Roe v. Wilkinson*, Butler's Co. Litt.; and *Roe v. Charnock*, Peake's C. 5.

(*x*) Evans's Pothier, Vol. II. p. 335; and see tit. *Presumption*.

consistent with and consequent upon the stipulations in the contract: as to show that a tenant under a lease is entitled to an away-going crop, according to the custom of the country (*y*); or that * a heriot is due by custom on the death of a tenant for life, although not mentioned in the lease (*z*); for such customs are not repugnant to the contracts, but consistent with them, and the rights are consequent upon the taking of the land. But no customary right can be established which is *inconsistent* with the terms of a contract.

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Admissibility
and effect.

A custom for a lord of a manor to have common of pasture in all the lands of his tenants for life or years, is void, because the custom is contrary to the lease (*a*); nor would the custom of the country be evidence to show a different time of quitting from that expressed in the lease (*b*).

Where, indeed, the terms used in a contract are of dubious meaning, the custom and usage of the country, or of any particular class of persons, as merchants conversant with the term, to use it in a particular sense, is evidence that the parties themselves so intended to use it. But where the meaning of the terms is plain and unequivocal, and *a fortiori*, where the law has annexed a particular meaning to the use of the term, it seems to be an universal rule that no evidence can be admitted of a custom or usage to receive such terms in a different sense (*c*).

Where a lease was from Michaelmas generally, it was held that it must be taken *prima facie* to import new Michaelmas, and that evidence could not be admitted to show the understanding of the parties that the holding was to be from old Michaelmas (*d*); and the * same rule seems equal- * 456

(*y*) *Wigglesworth v. Dallison*, 1 Doug. 201, affirmed in the Exchequer Chamber.

(*z*) *P. C. White v. Sayer*, Palm. 211.

(*a*) *Ibid*.

(*b*) *Per Le Blanc*, J. 6 East, 122.

(*c*) *See Parol Evidence*.

(*d*) *Doe v. Lea*, 11 East, 312. This case seems to overrule that of *Forley v. Wood*, there cited; in which Ld. Kenyon held at *Nisi Prius*, that evidence was admissible that, by the custom of the county of Kent, all demises to hold from Michaelmas commenced at old Michaelmas. *Qu.* however, whether, when the lease mentions a particular time for the commencement of the tenancy (as, Lady-day), and by the custom of the country it is usual to enter on the tillage lands at Candlemas, and the rest of the premises at Lady-day, the lease may not be considered as specifying the substantial time of holding, and as silent with respect to the subordinate terms of entry, so as to admit evidence of the custom. See the *dictum* of the Court in *Daggett v. Snowden*, 2 Bl. R. 1225. *Doe v.*

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ly to exclude the evidence of custom and usage for the purpose of showing that old Michaelmas was meant, since such evidence is merely the means of showing in what sense the contracting parties meant to use the particular term in question.

So a *reddendum*, in an old renewed lease, of so many quarters of corn, means the Winchester, and not the customary, bushel (*e*).

An agreement to sell a number of acres of land generally must be understood of statute, and not of customary, acres (*f*).

On the question, whether a liberty to cruise for six weeks authorized the party to cruize for the space of six weeks in the whole, taken at different intervals, *Ld. Mansfield* held that the conduct of the captain, in other instances under similar circumstances, was admissible in evidence (*g*) (1).

* 457 On a question, whether unnecessary delay had been practised, the witness was admitted to state in evidence * that the delay had not been greater than they had practised upon similar occasions (*h*).

Upon the same principle, the law of a foreign country where a contract has been made, is evidence to show the intention of the parties, and the nature and effect of the contract (*i*).

Watkins, 7 East, 551. *Doe v. Spence*, 6 East, 120. *Doe v. Howard*, 11 East, 498. In *Doe v. Benson*, 4 B. & A. 588, the distinction was taken between a letting by parol, in which case such evidence is admissible, and a letting by deed or other writing; but it seems that in the case of *Furley v. Wood*, there was a written lease. See *Runnington's Eject.* 112.

(*e*) *Master, &c. of St Cross v. Ld. Howard de Walden*, 6 T. R. 338. *R. v. Major*, 4 T. R. 750. By the stat. 22 & 23 Car. II. c. 12, the buyer of corn by any other than the Winchester measure forfeits 40s. besides the value of the corn. See *R. v. Arnold*, 5 T. R. 353; and see *Hockin v. Cooke*, 4 T. R. 314. 1 Roll. R. 420.

(*f*) *Morgan v. Tedcastle*, Popham, 55. *Wing v. Earle*, Cro. Eliz. 267. *Waddy v. Newton*, 8 Mod. 276. But see 2 Roll. R. 67. Cro. Eliz. 665. *Sir J. Bruin's case*, cited 6 Rep. 67.

(*g*) *Syers v. Bridge*, Doug. 527—Where it was held, that the mere opinion of witnesses, that the six weeks might be made up of disjointed intervals, was inadmissible, none of them having known a case so circumstanced.

(*h*) *Noble v. Kennoway*, Doug. 510.

(*i*) See tit. *Foreign Law*.

(1) [See *Dean v. Swoop*, 2 Binney, 72, where the former conduct of common carrier was not permitted to be given in evidence by him to prove that by the custom of the country he was answerable only for losses happening from his own negligence.]

A custom, as well as a prescription, being entire, must be proved as laid. A plea of justification under a custom for the tenants of a *particular* copyhold estate to cut turf, is not supported by proof of a custom for all the copyholders generally to cut turf (*k*). PART
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Variance.

Where the defendant justified under an easement claimed by the *inhabitants* of a parish, it was held that he brought himself within the description of an inhabitant by proof that he rented a stall in the parish, which he used occasionally (*l*).

One who would be benefited by the custom is not a competent witness to establish it, even in an action between other parties, since the verdict would afterwards be evidence for him (*m*). Competency.

DEATH.

THE proofs and presumptions relating to the death of any individual person will be considered more at large under the title *Pedigree*.

The proof of the death of any person known to be once living, is incumbent on the party who asserts the death (*n*); for it is presumed that he still lives till the contrary be proved. But in analogy to the statute * of bigamy (*o*), * 458 and the statute concerning leases for life (*p*), where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years. Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years (*q*) (1).

Proof that a person sailed in a ship bound to the West

(*k*) *Wilson v. Page*, 4 Esp. C. 71.

(*l*) *Fitch v. Fitch*, 2 Esp. C. 543.

(*m*) See *Common.—Copyhold.—Interest*.

(*n*) *Wilson v. Hodges*, 2 East, 312. *Throgmorton v. Walton*, 1 Rol. R. 416.

(*o*) 1 Jac. I. c. 11, s. 2.

(*p*) 19 Car. II. c. 6.

(*q*) *Hopewell v. De Pinna*, 2 Camp. 113. See also *Doe v. Jesson*, 6 East, 80. Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death. *Doe v. Deakin*, 4 B. & A. 433; see *R. v. Twynning*, 2 B. & A. 386.

(1) See Ante, p. 218, note (1). *King & al. v. Paddock*, 18 Johns. 141. *Crouch & ux. v. Eveleth*, 15 Mass. Rep. 305. Peake's Ev. ch. xiv. sect. 1.]

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Indies some years ago, which has not since been heard of, is evidence upon which a Jury may presume that the individual is dead; but the time of the death, if it become material, must depend upon the particular circumstances of the case (*r*).

A remarkable case is mentioned in the Reports, where the question was, whether the son survived the father so as to entitle the widow of the son to her dower, the father and the son having been hanged at the same instant; and it was found by the Jury, that the son, who had been observed to struggle the longest, survived the father (*s*).

DEATH-BED DECLARATIONS.

THESE are, as has been seen, evidence, on account of the solemn obligation which the situation of the party imposes upon him to declare the truth (*t*); and such a declaration is not the less admissible because
* 459 * it was made under the additional obligation of an oath extra-judicially administered.

Admissibility.

In *Woodcock's* case (*u*), the wife of the prisoner having been mortally wounded by him was taken to the poor-house, where she was attended by a magistrate, who, in the absence of the prisoner, administered an oath to her, and took down her statement in writing; and the declaration was afterwards admitted in evidence (*x*).

The presumption in favour of this species of testimony ceases where the party himself would not have been admitted to give evidence upon oath; and therefore the declaration of an attainted felon at the place of execution is inadmissible (*y*); but that of an accomplice is admissible, since the accomplice, if living, might have been examined upon oath (*z*).

(*r*) *Watson v. King*, 1 Starkie's C. 121. *Paterson v. Black*, Park's Ins. 433. 1 Bl. R. 404.

(*s*) Cro. Eliz. 503. 2 Bl. Comm. 132. A similar question arose from the circumstance of General Stanwix and his daughter being lost in the same vessel. Cited *Rex v. Dr. Kay*, 1 Bl. R. 640. Fearne's Essays. 2 Salkeld by Evans, 593. Evans's Pothier, Vol. II. p. 346. See tit. *Presumption*.

(*t*) *Supra*, Vol. I. p. 94.

(*u*) Leach's C. C. L. 563.

(*x*) *Woodcock's* case, Leach's C. C. L. 3d edit. 563.

(*y*) *R. v. Drummond*, Leach's C. C. L. 378, 3d edit. 1 East's P. C. 353. S. C.

(*z*) By all the Judges, *Tinkler's* case, East's P. C. 354. 356. [*Pennsylvania v. Stoops*, Addison's Rep. 332. S. P.]

Three several declarations had been made by the wounded person in the course of the same day, at the successive intervals of an hour each, the second had been made before a magistrate, and reduced into writing, but the others had not, the original written statement taken before the magistrate, was not produced, and a copy of it was rejected. A question then arose whether the first and third declarations could be received; and Pratt, C. J. was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other Judges held that the three declarations were three distinct facts, and that the inability to prove the second did * not exclude the first * 460 and third; and evidence of those declarations was accordingly admitted (a).

In order to warrant the admission, it must be shown, in the first place, that the declaration was made under an apprehension of impending death. And this may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension (b). And it is not essential that the party should apprehend *immediate* dissolution; it is sufficient if he apprehend it to be impending (1). Whether such evidence be admissible is a question for the Court, and not for the Jury, to determine, under all the surrounding circumstances of the case (c).

In *Tinkler's* case (d), a majority of the Judges were of opinion that the death-bed declaration of a deceased ac-

How given in evidence.

Force and effect.

(a) *R. v. Reason & Tranter*, Str. 500. 6 St. Tr. 502. According to the latter report of this case, the C. J. and Powis, J. deemed the evidence inadmissible; Eyre and Fortescue, Js. were for admitting it; but it appears that it was admitted. ●

(b) *R. v. Woodcock*, Leach's C. C. L. 563, 3d edit.

(c) *John's* case, East's P. C. 357. By all the Judges. *Welborne's* case, East's P. C. 359. Per *Ld. Ellenborough*, 1 Starkie's C. 522. In the previous case of *R. v. Woodcock*, Leach's C. C. L. 563, Eyre, C. B. left it as a question to the Jury, whether the deceased was under the apprehension of death when she made the declaration.

(d) East's P. C. 354. 356. See also *Westbeer's* case, Leach, 14.

(1) [Declarations of a deceased person, made the next day after he had received a wound, but six or seven weeks before his death, were held to be inadmissible. *State v. Moody*, 2 Hayw. 31. But the declaration of a deceased person, that he was poisoned by certain individuals, not made immediately previous to his death, but at a time when he despaired of his recovery, was admitted as a dying declaration. *State v. Poll*, 1 Hawks, 442. See also McNally, 174 381, & seq. Swift's Ev. 124.] ●

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effect.

complice was alone sufficient to convict the prisoner, because the declarant in that situation could have no interest in excusing herself, or unjustly charging others; but other Judges were of opinion that confirmatory evidence was necessary.

In general, although it is for the Court to decide upon the admissibility of the evidence, it is for the Jury, under the circumstances, to judge of the effect of it.

- * 461 Sir D. Evans has justly observed (e), that "Much * consideration should be given to the state of the mind of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected that it has often a tendency to obliterate the distinctness of his memory and perceptions; and therefore, whenever the accounts received from him are introduced, the degree of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment, of inference, and conclusion, which, however sincere, may be fatally erroneous. The circumstances of confusion and surprise, connected with the object of the declaration, are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related, with the other facts established in evidence, is to be examined with peculiar circumspection; and the awful consequences of mistake must add their weight to all the other motives for declining to allow an implicit credit to the narrative on the sole consideration of its being free from the suspicion of wilful misrepresentation."

- It is further to be remarked, that this seems to be the only instance in which evidence is admissible against a prisoner who has not had the power to cross-examine—an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. Finally, it has never been received except in cases of murder, where if the dying person were certain as to the author of the violence, yet in the case of a quarrel and conflict, he might be under a strong temptation to give a partial account of the transaction, although all motives of personal hostility had ceased. In other cases, it is far from improbable that he would attribute the fact to some person whom he suspected to be his enemy, when, if his
- * 462 grounds for supposing so * could have been investigated, they might have turned out to be very unsatisfactory.

(e) Pothier, by Evans. Vol. 2, p. 293.

Declarations of this nature have been admitted in civil cases, where they have been made by attesting witnesses to an instrument.

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In the case of *Wright v. Littler* (f), the plaintiff claimed under a will, dated 1743; the defendant claimed under a will, dated in 1745, and proved the hand-writing of the witnesses by whom it purported to have been attested. To disprove this will, the plaintiff called Mary Victor, the sister of William Medlicott one of the attesting witnesses, and upon cross-examination by the defendant's counsel, she stated that William Medlicott, in his last illness acknowledged and declared that the will of 1745 was forged by himself. Ld. Mansfield, in delivering the judgment of the Court, upon a motion for a new trial, said, "As the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience, I am of opinion that the evidence was proper to be left to a Jury" (g) (1).

In civil proceedings.

In a subsequent case (h), Mr. J. Heath, on the authority of the above case, admitted the declaration of a person who had set his name to a forged bond, and who, upon his death-

(f) 3 Burr. 1244. 1 Black. Rep. 346.

(g) Ld. Mansfield also observed upon the fact, that the evidence came out upon cross-examination, by the defendant, and had not been objected to at the trial; and said, that even if it had been upon examination by the plaintiff, it would have been equally admissible, especially since the will was all written and witnessed by him (William Medlicott), and gave the premises in question to his wife.

(h) 6 East, 195, cited by Ld. Ellenborough, C. J.

(1) [In *Wilson v. Boerem*, 15 Johns. 286, it was held that declarations *in extremis*, are inadmissible evidence, either in a civil action or a criminal prosecution, with the single exception of cases of homicide, in which the declaration of the deceased, after the mortal blow, as to the fact of the murder, is admitted. Thompson, C. J. says, "No case, either in the English courts or in our own, has fallen under my observation, where such evidence has been admitted in a civil suit. *Wright v. Littler*, (3 Burr. 1244. 1 Bl. Rep. 345) has been urged. But a recurrence to the facts will show that the circumstances of that case were special and peculiar; and the admission of the declaration of *Medlicott* was not supported under this rule. Lord Mansfield, in pronouncing the opinion of the court, says, the testimony comes out on the cross-examination of the defendant's counsel, and no objection made to it; and after mentioning the special circumstances of the case, he says, no general rule can be drawn from it; thereby expressly excluding the idea that the evidence was admitted merely as the dying declaration of *Medlicott*." See also *Wilson v. Boerem*, Anth. N. P. 176, & note (a).]

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bed, begged pardon of Heaven for having been concerned in the forgery.

* 463 The ground, however, upon which such evidence has been admitted, is this :—If the attesting witness had * been living, he must have been called, and might have been cross-examined as to the validity of the instrument, the authenticity of which depends upon the credit given to it by his attestation (i).

In a late case, the Court of King's Bench said that as it did not appear that such evidence had ever been received, except in cases of murder, where the declarations had been made by the deceased, and in civil cases, where the declarations had been made by attesting witnesses, they would not further extend the rule ; and therefore the Court, held the declaration of a dying person as to the relationship of the lessor of the plaintiff in ejectment, to the person last seized (l), to be inadmissible (1).

DEBT.

THIS action is founded either upon a specialty, or upon a parol contract, or duty. The proofs in the former class

(i) 4 B. & A. 55. Upon the same principle, evidence has been admitted to impeach the character of attesting witnesses who are dead, and whose hand-writing is proved in order to substantiate the instrument. See tit. *Witness*.

(k) *Doe v. Ridgway*, Mich. 1, Gen. IV. MS. and 4 B. & A. 53.

(l) Ibid. A. having been convicted of perjury, pending a rule for a new trial, shot the prosecutor, and it was held, that an affidavit of his dying declarations on the subject of the perjury was not admissible ; and it was held that such declarations were admissible in those cases only where the death was the subject of the charge, and where the declarations related to the circumstances of the death. *R. v. Meade*, 2 B. & C. 605. In *R. v. Hutchinson*, Cor. Bayley, J., Durham Sp. Ass. 1822, the prisoner being charged with administering savin to a pregnant woman, it was held that her dying declarations, although they related to the cause of her death, were inadmissible, the death not being the subject of inquiry. 2 B. & C. 608, in the note.

(1) [Evidence of the declarations of a grantor with warranty cannot be received to support a title deduced from him, though the declarations be made in *articulo mortis*. *Jackson v. Vredenberg*, 1 Johns. 159. Declarations of a testator, though made in *extremis*, are not admissible to show duress at the time he executed his will. *Jackson v. Kniffer*, 2 Johns. 31. See also *Gray v. Goodrich*, 7 Johns. 95.

In an action by a father for the seduction of his daughter, her dying declarations charging the defendant as her seducer, are held to be admissible evidence, in North Carolina. *McFarland v. Shaw*, 2 Car. Law. Repos. 102.]

of actions are considered under the titles *Bond—Covenant—Deed*. Those which belong to the latter are distributed also under the titles of *Bills of Exchange, Goods sold and delivered, &c.*; and where the action is for a penalty, under the title *Penal Action*.

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Under the plea of *nil debet*, the plaintiff must prove all the material allegations in his declaration, although the plea be an improper one, to which he might have demurred (*m*). The defendant may, in general, give in evidence such matter as shows that he was not indebted to the plaintiff.

Nil debet.

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* Where, indeed, the action is immediately founded upon a record or specialty, *nil debet* is an improper plea; for the defendant cannot by his plea admit the existence of the record or specialty, and yet deny the debt (*n*). But whenever a specialty or record is but inducement to the action, which is founded upon extrinsic matter of fact, *nil debet* is a good plea, as in debt for rent by indenture (*o*), or for an escape (*p*), or on a *devastavit* (*q*).

Evidence
under *nil debet*.

In an action of debt for rent, *nil debet* is a good plea, although the demise be by deed, for the deed does not acknowledge the debt, as an obligation to pay money does; the debt accrues by the subsequent enjoyment (*r*), and *non est factum* here would not be an answer commensurate with the declaration. It may be very true that the deed is the deed of the lessee, and yet that no debt has arisen; for something *ultra* the deed, that is, the enjoyment of the land, is essential to the creation of the debt, which is, technically speaking, a matter in *pais* to be proved before a Jury (*s*). Consequently, the defendant, in an action of debt for rent, may prove under this issue, that the lessor has kept possession of the premises, or (as it seems) of any part (*t*); for as the action arises not on the contract merely, but is

(*m*) See tit. *Bail-bond*, *supra*, 140, note (*u*).

(*n*) Gilb. L. E. 79, 2d edit. 1 Will. Saund. 39, n. (3). Cowp. 589. Hardr. 332. *Tyndal v. Hutchinson*, 3 Lev. 170. *Warren v. Consett*, 2 Ld. Raym. 1500. 2 Str. 778. 8 Mod. 107. Although facts be mixed with it, as in an action by the assignee of the sheriff upon a bail-bond. Fort. 363. 2 Ld. Raym. 1503. 2 Str. 780. 5 Burr. 2586.

(*o*) Cowp. 589. [*Bullis v. Giddens*, 8 Johns. 82:]

(*p*) Salk. 565.

(*q*) Ibid. and 1 Saund. 219.

(*r*) B. N. P. 170. Hardr. 332. 1 Will. Saund. 39. Gilb. L. E. 289, 2d edit. Cowp. 589.

(*s*) Gilb. L. E. 280, 2d edit. B. N. P. 170.

(*t*) See Gilb. L. E. 283, 2d edit. 1 Inst. 148, a. Vent. 277. Rol. Ab. 398.

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Nil debet,
proof under.

*also founded on the permanency of the profits according to the contract, this is evidence to show that no debt ever existed (u).

So the lessee may show an entry, or expulsion from the premises by the lessor, or any suspension of rent by him, under this issue (x), or that the lessor has entered into part of the demised premises; for since the lessor, by his own wrongful act, deprives the party of the benefit of the entire contract, no apportionment can be made in his favour (y). So he may show an eviction by a third person. In order to prove this, he must show that the evictor had a title to enter, and did enter, before the rent was due, and show also by what process he was evicted (z)(1). This must be done by the production of the judgment in ejectment, &c. or by proof of an examined copy of it, and by proof of the execution of the writ of possession under the warrant, and an examined copy of the return.

But the defendant cannot, where the demise is by deed, give evidence to show that the plaintiff had no interest in the demised tenements; for if he had pleaded it, the plaintiff might have replied the indenture, or might have demurred, for the declaration being on the indenture, the estoppel appears on record (2). But if the defendant were

(u) 2 Rol. Ab. 677, pl. 21. Gilb. L. E. 283, 2d edit.

(x) It is frequently pleaded; but it seems that this is optional on the part of the defendant. 1 Will. Saund. 205, n. (2). B. N. P. 177. 1 Mod. 35. 1 Vent. 258. 1 Ld. Raym. 566. 1 Sid. 151. 2 Keb. 762. *Contra*, 2 Leon. 10. Goulds. 80. pl. 18. Ow. 85.

(y) 1 Inst. 148, a. 1 Vent. 277. Rol. Ab. 398. Gilb. L. E. 283. [*Vaughan & al. v. Blanchard & al.* 1 Yeates, 176.]

(z) Fort. 360, *Cooper v. Young*, 8 Geo. II. *Jordan v. Twells*, Rep. Temp. Hardw. 171.

(1) [Where a tenant is dispossessed by a public enemy, he ought to pay rent only for the time he enjoyed peaceably, and not for the time he was prevented by the casualties of war. *Bayley v. Lawrence*, 1 Bay, 499. See vide *Pollard v. Shaffer*, 1 Dallas, 210. American Museum, Vol. II. p. 470, where it was held that a lessee, who had been dispossessed by the British army in 1777, was bound to pay rent for the whole term,—but that he was excused from keeping and giving up the premises in good repair, according to his covenant, on account of the destruction and waste committed by the army.]

(2) [Where a lessor threatened to turn the tenant off by force, if he did not take a lease, it was held that the lessee might contest the lessor's title. *Hamilton v. Marsden*, 6 Binney, 45. And the acceptance of a lease of a part of a tract of land does not estop the lessee from contesting the lessor's title to the remainder of the tract. *Pederick v. Searle*, 5 Serg. & Rawle, 236.]

to plead *nil habuit in tenementis*, and the plaintiff were to join issue on the plea, instead of relying on the estoppel, the defendant would * not be concluded by the deed, and the Jury would be bound, as has already been seen, to find according to the truth of the fact (b). Neither can the defendant, under this issue, give in evidence disbursements for necessary repairs, although the plaintiff is bound to repair, for the proper remedy is by an action of covenant (c), unless by the terms of the covenant the repairs are to be paid out of the rent (d). It is no defence that the lessee did not actually enter and enjoy where he might without the hindrance of the lessor, have entered and enjoyed, for he cannot defend himself by his own laches (e).

The general rule is, that the plaintiff may give in evidence, under this plea, any matter which shows that nothing was due at the time when the action was brought (f), as payment (g), or a release (h). But the Statute of Limitations must be pleaded; and on a *qui tam* action to recover penalties, it has been held that the defendant cannot give in evidence the record of a recovery against him by another person for the same forfeiture (i).

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proof under.
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* DECEIT.

* 467

To support an action on the case for deceit, the plaintiff must allege, and prove, a fraud to have been committed by the defendant, and that a damage has resulted from the fraud to the plaintiff (k). The fraud must consist in depriving the plaintiff, by deceitful means, of some benefit which the law entitled him to demand or expect.

General require-
ments.

It is matter of evidence to prove that the deceitful and fraudulent means have been used as alleged, and that the plaintiff has in fact been deceived by them to his detri-

Deceitful
means.

(b) Salk. 277. B. N. P. 170; *supra*, Vol. I. p. 303. But where the demise is by parol agreement, see 1 Ld. Raym. 746. B. N. P. 177.

(c) B. N. P. 177. 1 Ld. Ray. 370.

(d) 1 Ld. Ray. 420.

(e) Rol. Ab. 605. Gilb. L. E. 284.

(f) Com. Dig. Pleader, 2 W. 17.

(g) Gilb. L. E. 285. See tit. *Bond—Payment*.

(h) Per Holt, J. *Hatton v. Morse*, 1 Salk. 394, S. C. 2 Ld. Ray. 787. See Co. Litt. 182, b. *contra*. Gilb. L. E. 285.

(i) *Bredon v. Harman*, Str. 701; *vide supra*, Vol. I. p. 207, & *infra*, tit. *Penal Action*.

(k) 12 East, 636.

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- ment; but it is usually a question of law, arising upon the facts, whether an action lies in respect of damage resulting from such means; for it is not a general rule, that wherever fraud and damage concur an action is maintainable. Such means must be used as are likely to impose on a person of ordinary prudence and circumspection, to throw him off his guard on a point where he might reasonably place confidence in the representation of the defendant, and they must be such as deprive the party of a benefit which in point of law he has a right to expect (l).
- * 468 Thus no action is * maintainable in respect of a false representation by a vendor of the intention or will of another in respect of the goods (m).

Proof of fraud. The plaintiff must, in the first place, prove fraud, *in fact*; he must show that the representation was not only *falsely*, but that it was *fraudulently* made, with intent to deceive the plaintiff; for the fraud or deceit is the foundation of the action (n)(1). Thus in all cases of deceit in

(l) Per Lord Ellenborough, in *Vernon v. Keys*, 12 East, 631. B. N. P. 30. In *Bayley v. Merrell*, Cro. Jac. 386, on an agreement to carry goods at so much *per cwt.*, it was held that no action lay for falsely affirming that a load of madder contained a less quantity of *cwts.* than it contained in fact. In 1 Roll. Ab. 801, pl. 16, it was held that one who was induced to buy a term by a false assertion on the part of a seller, that a stranger had offered 20*l.* for it, could not recover; where the plaintiff bought of the defendant certain buildings, trade and stock, under a false representation by the latter that he was about to enter into partnership with certain persons in the same trade (whose names he would not disclose), and that they would not consent to his giving the plaintiff more than a certain sum, but in fact they had authorized him to make the best terms he could, and would have given a larger sum, and in fact the defendant charged them with a larger sum, it was held that no action was maintainable; for it was either a false representation of the intention of another, or a mere *gratis dictum* of the defendants, on which it was the indiscretion of the plaintiff to rely. *Vernon v. Keys*, 12 East, 632, affirmed on error, in the Exchequer Chamber, 4 Taunt. 488.

(m) *Vernon v. Keys*, 12 East, 632. See the last note.

(n) [*Otis v. Raymond*, 3 Conn. Rep. 413. *Munroe v. Gardner*, 1 Rep. Con. Ct. 328. 475. *Emerson v. Brigham*, 10 Mass. Rep. 197. *Yelv. 21. a. note* (1).] Where there has been an *express warranty*, although the action be framed in *tort*, and a *scienter* averred, it need not be proved (*Williamson v. Allison*, 2 East, 446), for then the *express warranty* is the gist of the action, and not the deceit (see tit. *Assumpsit—Warranty*); and where there is a warranty the action is usually laid in *assumpsit*, in order that the declaration may em-

(1) [An action of deceit will not lie against a purchaser of a chattel who makes false affirmations of his means and property in order to postpone the day of payment. *Fisher v. Brown*, 1 Tyler, 387.]

the sale of personal chattels, in respect of * the quality, soundness or goodness of the subject-matter, the plaintiff must prove not only the falsity of the representation, but also the *scienter*, the knowledge of the defect on the part of the defendant. Proof of fraud.

If the defendant sell goods as his own, the plaintiff should show that he knew that they were not his own (*o*). For if the defendant had reasonable ground to suppose that they were his own property, as if, for instance, he had bought them *bona fide*, this action will not lie against him (*p*). But if the defendant represent them to be the goods of *A. B.*, and that he had authority from *A. B.* the owner, to sell them, it will be sufficient for the plaintiff to show that he had no authority from *A. B.*; and proof that they were the goods of some other person would be *prima facie* evidence of the want of authority in the defendant,

brace the money-counts. The propriety of this practice was established in the case of *Stuart v. Wilkins*, Doug. 18. [*Jones v. Conoway & al.* 4 Yeates, 109.] Where the action is framed in *tort*, the plaintiff, if he prove the *scienter*, will be entitled to recover, although the representation made may fall short of a warranty.

The plaintiff must show that the representation was *fraudulently* made, either out of *ill-will* or *causa lucri*. *Ames v. Whitmore*, 2 Moore, 713.

Where a vendor *knew* of defects in a ship at the time of sale, which it was impossible that the buyer should discover, and did not disclose them at the time of sale, Ld. Kenyon held that he was liable to an action for the deceit, as on a warranty that the ship was free from all defects, although by the express terms of the contract the buyer was to take her with all faults (*Mellish v. Motteur*, Peake's C. 115.) But in the subsequent case of *Baglehole v. Walters*, (3 Camp. 154,) Ld. Ellenborough stated that he could not subscribe to the doctrine of the former case; he said, "Where an article is sold with *all faults*, I think it quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser." There, however, the plaintiff failed in proving *any fraud*. See *Parkinson v. Lee*, 2 East, 314. [*Schneider & al. v. Heath*, 3 Camp. 506. *Shepherd v. Kain*, 5 B. & A. 240. Post. tit. *Vendor and Vendee. Warranty*, 5 Johna. 411, note.]

(*o*) B. N. P. 30. Salk. 210. On the sale of a personal chattel the law will imply a warranty as to the right to sell (3 T. R. 57. 2 Bl. Com. 451. 3 Bl. Com. 166. Peake's C. 94.) But a warranty as to the right to real property will not be implied (2 B. & P. 13. 3 B. & P. 166. Dougl. 654. 6 T. R. 606). A warranty as to the soundness, goodness, or value of a horse, or other personal chattel, is never implied. 2 East, 314. 2 Bl. Com. 451. 3 Bl. Com. 165. 2 Rol. R. 5.

(*p*) Ibid.

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and sufficient to put him upon proving that he had authority (*q*).

Proof of fraud. So, if a man sell a horse, stating him to be of a certain age, according to a pedigree delivered to him when he bought the horse, and shown to the purchaser (*r*), or sell a picture as the production of an ancient master (*s*), or as having formed part of a particular cabinet of paintings, and such representations be made according to the honest belief of the owner at the time, no action is maintainable, although the representation * be incorrect; but it is otherwise if the vendor *knew* at the time that he was representing a falsehood.

**Character—
Proof of fraud.**

In an action for giving a false representation of the credit and circumstances of a third person, to the detriment of the plaintiff, it is not necessary to show that the defendant expected to derive any benefit from the deceit, or that he colluded with the other (*t*). The ground of the action is the intention to deceive and injure the plaintiff (*u*), and of this, as in all other questions of *mala fides*, the Jury are to judge (*x*). Where the defendant had informed the plaintiff that a party might safely be credited, and that he spoke from his own *knowledge*, and not from hearsay, the plaintiff will not be liable to damages although the representation be false, and the plaintiff in consequence receive an injury, if the representation was in fact made by the defendant *bona fide*, and under the belief that it was true (*y*). It is not sufficient to show that the defendant intended to deceive when he made the representation, without proof that he intended to defraud the plaintiff (*z*).

False character.

(*q*) B. N. P. 31. 1 Danv. Ab. 176.

(*r*) *Dunlop v. Waugh*, Peake's C. 123.

(*s*) *Jendwine v. Slade*, 2 Esp. C. 572.

(*t*) *Pasley v. Freeman*, 3 T. R. 51.

(*u*) *Tapp v. Lee*, 3 B. & P. 367. 3 T. R. 51.

(*x*) *Eyre v. Dunsford*, 1 East, 318. The defendants having credit lodged with them in favour of *T.* to a certain amount, but upon an express stipulation that goods should previously be lodged with them to treble the amount, informed the plaintiff, who applied to them for information as to *T.*'s responsibility, that they might safely execute *T.*'s order for goods upon credit, and stated the fact that such credit had been lodged with them, but wholly omitted the previous condition; and it was held that this was a *suppressio veri*, which warranted the Jury in finding fraud. [*Ward v. Center*, 3 Johns. 271. *Upton v. Vail*, 6 Johns. 181.]

(*y*) *Haycraft v. Creasy*, 2 East, 92.

(*z*) *Scott v. Lara*, Peake's C. 226; & *infra*, 473. [*Young v. Covell*, 8 Johns. 23.]

The party whose solvency is misrepresented is a competent witness (a). Similar misrepresentations made by the defendant to other persons are, it has * been held, admissible in evidence, to prove a fraudulent connection between the defendant and the customer (b).

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The gist of the action is that the plaintiff was imposed upon by the *fraud* of the defendant. If therefore it appear that the plaintiff was aware of the falsity of the representation, or made the contract, to use a common phrase, with his eyes open to the defect, he is remediless, for he was not *deceived*. Nay, further, if he had the full means of detecting the fraud and ascertaining the truth, and neglected to inform himself of it when he might easily have done so, or even if he placed a blind and wilful confidence in a representation which was not calculated to impose upon a man of ordinary prudence and circumspection, it seems that an action of deceit cannot be supported. For although the plaintiff in these cases may, in point of fact, have been deceived, yet it was a consequence of his own folly that he was so defrauded, and *vigilantibus non dormientibus jura subveniunt*.

Proof of deception.

Where a false representation was made on the sale of goods, but the plaintiff had full opportunity to inspect them, and a *written contract* was entered into, the terms of which had no reference to the representation, it was held that the plaintiff was not entitled to recover (c).

If the vendor of a horse affirm that he is sound wind and limb, when it is apparent that he has but one eye (d), or warrant an house to be in perfect repair, which wants a roof (e), the buyer must abide by the consequence of his own laches.

* The possession of goods by a vendor, induces a reasonable presumption of ownership and title (f). But it is * 472

(a) *Smith v. Harris*, 2 Starkie's C. 47. See also *Gainsford v. Blackford*, 6 Price, 68. *Richardson & al. v. Smith*, 1 Camp. 277. For the witness cannot, in an action for the price of the goods, avail himself of the verdict.

(b) *Beal v. Thatcher*, 3 Esp. C. 194; *qu.*

(c) *Pickering v. Dawson*, 4 Taunt. 779.

(d) Unless, as is quaintly remarked in the Year-books, the purchaser be also blind.

(e) *Bayley v. Merrel*, Cro. Jac. 367; and per Grose, J. 3 T. R. 55. *Dyer v. Hargrave*, 10 Ves. 507. Where the defect is so obvious and visible, it is presumed that the parties did not intend the warranty to apply to it.

(f) B. N. P. 30. *Medina v. Stoughton*, 1 Salk. 210. 1 Ld. Ray. 593.

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sale of goods.

laid down, that if the seller was out of possession at the time of the sale, no action will lie against him, though it be not his own, without an express warranty, for there was room to question his title (g).

If the vendor of a house affirm that the rent of a house was more than it really was, whereby the vendee was induced to give more for it than it was worth, an action, it is said, will lie, for the value of the rent is within the private knowledge of the landlord (h); but if the seller merely affirm that the thing sold is worth so much, or that one would have given so much for it, although the affirmation be false, yet if the buyer might inform himself as to value, no action lies. And this principle, it is said, applies to all cases where the purchaser may easily ascertain the true value (i). But where the value of the article is not perfectly obvious upon mere inspection, but requires a particular degree of skill for the ascertainment, or depends upon collateral circumstances, the action may be maintained.

If a merchant sell one kind of silk for another, whereby the purchaser is imposed upon in the value, the action lies, although it turn out that the deceit was not in the merchant, but in his factor, for he is responsible, *civiliter*, although not *criminaliter*, for the * deceit of his factor (k), and although the representation is in its own nature calculated to deceive.

It must be proved that the damage in fact resulted from the fraudulent act of the defendant. Where the plaintiff's agent applied to A. for the character of an intended vendee, and A. made a fraudulent representation on the subject, and afterwards the defendant, who was the brother of A., to whom the agent also applied, but did not say at whose request, confirmed his account, and the agent communicated A.'s representation to the plaintiff's, but did not communicate the defendant's representation, it was held that

(g) Salk. 210. B. N. P. 31.

(h) *Risney v. Selby*, 1 Salk. 211. 2 Ld. Ray. 1118. 1 Sid. 146. B. N. P. 31.

(i) B. N. P. 31. 1 Sid. 146. Where the plaintiff brought an action against the defendant, alleging that the defendant, having skill in jewels, sold him a stone which he affirmed to be a Bezoar-stone, and sold it as such, judgment was arrested, because the declaration did not allege that the defendant knew it to be a Bezoar-stone, or warranted it. See also *Pickering v. Dawson*, 4 Taunt. 779.

(k) *Hern v. Nichols*, 1 Salk. 289. B. N. P. 31. [See *Conner v. Henderson*, 15 Mass. Rep. 319. *Henderson v. Sevey*, 2 Greenleaf, 139.]

the action was not maintainable, for the damage did not result from the defendant's representation; but from *A.*'s (*l*). So no action will lie for any misrepresentation where the plaintiff or his agent knew that the party whose circumstances were misrepresented was insolvent (*m*).

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Fraud in the
sale of goods.

If *A.* falsely represent to *B.* the circumstances of *C.*, in consequence of which *B.* sells to *C.* goods upon credit from time to time, *A.* is liable to *B.* although *C.* pays for the goods first supplied, on the purchasing of which the representation is made (*n*). He continues, it is said, to be liable within a reasonable time, and to a reasonable amount (*o*); in other words, the liability depends so much on the peculiar circumstances * of each case, that the law cannot define generally the limits either as to time, or as to amount. Where *B.* had sold goods to *C.* on the representation of *A.*, and then told *C.* that he would sell him no more without further references, it was held that *A.*'s liability did not extend beyond the time of such declaration (*p*). For this is strong, if not conclusive, evidence to show that the plaintiff was no longer deceived by *A.*'s misrepresentation. It is no defence to an action of this nature, that the plaintiff agreed to take the article with *all faults*.

Proof of da-
mage.

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Where the vendor of a ship represented her to have been built in 1816, and in fact she had been built a year earlier, it was held that the plaintiff was entitled to recover, although he was to take her on those conditions (*q*).

So if a watch be warranted which turns out to be worthless, the plaintiff is entitled to recover, notwithstanding a stipulation that if he disliked the watch the vendee would exchange it (*r*). So where *A.* fraudulently misrepresented

(*l*) *Scott v. Lara*, Peake's C. 226. Neither did the defendant intend to impose upon the *plaintiffs*.

(*m*) *Cowen v. Simpson*, 1 Esp. C. 290.

(*n*) *Hutchinson v. Bell*, 1 Taunt. 558. But there *B.* stated to *A.* that he proposed to open an account with *C.* as a *general customer*. In the case of *De Graves v. Smith*, (2 Camp. 533, Cor. Ellenborough, C. J.) where the interrogation was general, and the false information given without reference to any proposed mode of dealing, it was held that the defendant was responsible for the first parcel of goods only, although the party became insolvent within a few months, and after the delivery of a second parcel on credit. [See *Rogers & al. v. Warner & al.* 8 Johns. 119.]

(*o*) *Ibid.*

(*p*) *Vide* *pts* (*n*).

(*q*) *Fletcher v. Bowsher*, 2 Starkie's C. 561, Cor. Abbott, L. C. J.

(*r*) *Wallace v. Jarman*, 2 Starkie's C. 162, Cor. Ellenborough, L. C. J.

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the circumstances of *B.* to *C.*, it was held that he was liable, although he had promised to pay *C.* if *B.* did not. (*s*).

DEED.

1. Production of the deed, and proof under the plea of *non est factum*.
2. Evidence by the defendant under the same plea.
3. Evidence under special pleas.
4. Admissibility and effect of a deed in evidence.

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Non est factum.

* THE plea of *non est factum* puts in issue the execution of the deed, and its continuance as a deed at the time of the plea. Where the plaintiff has not the possession of the deed, he may aver that it has been lost or destroyed, or that it is in the possession of the adversary (*t*); but the deed, if pleaded with a profert, must be produced, or the plaintiff will be non-suited (*u*). Where the deed has been improperly pleaded with a profert on *non est factum*, he should move to amend the record; but an application at *Nisi Prius* for that purpose comes too late (*x*).

Proof of execution.

Proof of the execution consists in evidence of the sealing and delivery of the deed by the testimony of the attesting witness (*y*), in the manner already stated (*z*). (1) The deed

(*s*) *Hamar v. Alexander*, 2 N. R. 241.

(*t*) *Reed v. Brookman*, 3 T. R. 151. *Totty v. Nesbitt*, *ibid.* in note. *Bolton v. Bishop of Carlisle*, 2 H. B. 259.

(*u*) *Smith v. Woodward*, 4 East, 585.

(*x*) *Pain v. Bustin*, 1 Starkie's C. 74. If a deed be alleged to be lost through time and accident, but be found before the trial, it may be given in evidence. *Hawley v. Peacock*, 2 Camp. 557.

(*y*) Bac. Ab. Ev. 647.

(*z*) *Vide* Vol. I. p. 327.

(1) [On the plea of *non est factum*, proof that the defendant acknowledged in court that he had *subscribed his name* to the instrument and delivered it *as a form* by which to draw such an instrument, without proof that he ever acknowledged the same, or delivered it as *obligatory upon him*, is not sufficient to charge him. *Asberry, &c. v. Calloway*, 1 Wash. 73. On the same plea to an action against executors, evidence that the obligor (the testator) was an illiterate German—that the subscribing witnesses, at the time of its alleged execution, lived sixty miles off, in another state,—that they and the obligee were persons of general bad character—and that many respectable persons, who spoke both German and English, lived in the obligor's neighbourhood, at the time when the instrument was alleged to be executed—was admitted as circumstances from which the jury might infer that the testator did not execute it. *Sides v. Schnebly*, 3 Har. & M'Hen. 243.]

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Proof of execution.

may be admissible in evidence although when produced at the trial it appear that the seal has been torn off. As, where it was sealed when pleaded, and the seal was afterwards torn off; for, as has been already observed, the issue is upon its continuance as a deed at the time of pleading (a). And after the plea with a profert, it is in the custody of the law, and if the seal be broken off in Court the law will not allow the innocent party to be prejudiced (b). So it may be shown that the seal has been torn off by * accident after the execution of the deed (c), and before the time of pleading (d); or that it has been cancelled through the practice of the obligor (e) (1).

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If the deed be altered by the party (the obligee) himself although but in an immaterial point, he thereby avoids the deed (f); for the law takes every man's act most strongly against himself. An alteration by a stranger, in an immaterial point, will not avoid the deed; but it is said to be otherwise if a stranger alter it in a material point, for the witnesses cannot prove it to be the deed of the party where there is any material difference (g). (2) And an alteration in any covenant will avoid the whole deed, for the deed

(a) Besides this, the deed, after it has been pleaded with a profert, is in the custody of the law. Cro. Eliz. 120. 5 Co. 119, b. 2 Bulst. 247. Dy. 59, pl. 12, 13. Doc. Pl. 262. Roll. R. 39, 40. 2 Roll. Ab. 29.

(b) *Smith v. Woodward*, 4 East, 585. If the seal be broken off in Court the deed shall be enrolled for the benefit of the parties; for where any thing is impaired whilst in the custody of the law, it is restored by the benignity of the law as far as possible. 2 Inst. 676.

(c) And this is a question for the Jury. In Palm. 403, it was holden that a deed leading the uses of a recovery was good evidence of such uses, although the seals were torn off, it being proved to have been done so by a young boy. B. N. B. 268. It is there suggested that such evidence would not be sufficient under the plea of *non est factum*, although it might where the deed was used as evidence collaterally.

(d) Pal. 403. 1 Mod. 11.

(e) 1 Vent. 297.

(f) B. N. P. 267. 10 Co. 92. 11 Co. 27, a.

(g) B. N. P. 267. 11 Co. 27. Qu. therefore, whether the deed is avoided by the act of a stranger, where the contents of the original deed can be satisfactorily proved. As the act of a stranger in tearing

(1) [See *Cutts v. United States*, 1 Gallison, 69, where it was decided that a deed is not avoided by the seal's being torn off fraudulently or innocently by the obligor, but may be declared on as a subsisting deed.]

(2) [As to the effect of the alteration of deeds, see *Chesley v. Frost*, 1 N. Hamp. Rep. 145. *Penny v. Corwith*, 18 Johns. 499. *Hatch v. Hatch*, 9 Mass. Rep. 307. *Barrett v. Thorndike*, 1 Green-

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Proof of execution.

cannot be the same unless every covenant be the same (*h*).

The proof of the execution of a deed has already been considered (*i*). No particular form of delivery * is essential. Mere delivery without words is sufficient (*k*); as if the obligor throw it down on a table with *intent* that the party shall take it, and he takes it accordingly (*l*); or deliver it *as his deed* into the hands of a stranger (*m*). But

off the seals does not vitiate the deed, it is difficult to say why his alteration of it should avoid it; the reason above assigned for considering it to be *wholly void* assumes that which may or may not be true, according to circumstances. See Com. Dig. tit. Fait, (1). Roll. 41 Cro. Eliz. 626. Mo. 10, *infra* 480, n. (*p*). [See *Jackson v. Malin*, 15 Johns. 297, where it is *doubted* whether a material alteration of a deed, by a stranger, will avoid it.]

(*h*) 11 Co. 28, b. B. N. P. 267. Where a deed operated differently as to different parties, and after execution by some, and before the execution by others, was altered in parts, which did not affect the former, but only the latter, it was held to be binding on all. *Doe d. Lewis v. Bingham*, 4 B. & A. 672.

Where the lessor of the plaintiff in ejectment claimed under a deed proved to have been mutilated after execution, it was held that the deed was void, but that the avoidance did not divest the estate which had passed under the deed. *Doe d. Beanland v. Hirst*, 3 Starkie's C. 60. [See note (2) commencing on the preceding page.]

If an interlineation appear in a deed, and there be no evidence to show how it was done, it will be presumed to have been done before the execution. Vin. Ab. vol. 12, p. 58.—(1)

A deed takes effect from the delivery. A condition to pay for goods then, and afterwards to be delivered, does not bind as to goods delivered between the date and execution. Com. Dig. Fait, G. Cro. Jac. 264.

(*i*) Part II. sec. cxi. p. 332. A party may be bound by a covenant in an indenture of lease, although he does not seal it, if he agree to the lease (Co. Litt. 231, a. Com. Dig. tit. Fait, A. 2). As where *A.* demises to *B.* and *C.*, who covenant with *A.*, and *B.* seals the counterpart, and *C.* agrees to the lease, but does not seal it. [See *R. v. Houghton-le-Spring*, 2 B. & A. 375.]

(*k*) Co. Litt. 36, a. 2 Rol. 24, l. 28. 45.

(*l*) Ow. 95. But it is no delivery, unless the intent be found. Ibid. and 1 Lev. 140.

(*m*) 2 Rol. 24, l. 42. Although it was not to be delivered till after the performance of a condition. 2 Rol. 25, l. 30. 1 Lev. 152.

leaf, 73. Cases cited post. p. 481, note. and p. 477. note. The effect of an alteration in a deed conveying land is different from an alteration of a bond, &c. A grantee's title is not impaired by a voluntary destruction of his title deed, or by an immaterial alteration thereof fraudulently made by himself. *Hatch v. Hatch*, and *Barrett v. Thorndike*, *ubi sup.* See also *Doe d. Beanland v. Hirst*, note (*h*) on this page.]

(1) In *Preest v. Gratz & al.* 1 Peters' Rep. 369, and *Morris's Lessee v. Vanderen*, 1 Dallas, 67, it was held that a material erasure, or interlineation, shall be presumed to have been made before the execution of the deed, unless the contrary is shown.]

it is otherwise if he deliver to a stranger as an *escrow*, to be his deed upon performance of *conditions* (n); but it cannot be delivered to the obligee as an *escrow* (o). A delivery by a stranger with the assent of the maker is sufficient (p).

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Proof of delivery.

A delivery may also be by words, without an actual delivery; as where the deed lies on the table, and the obligor says to the obligee, 'take it up as my deed (q).' (1)

If the obligor once deliver it as his deed, with intent that

(n) Co. Litt. 36, a. 2 Rol. 25, l. 25. [*Jackson v. Catlin*, 2 Johns. 248.]

(o) Cro. Jac. 85, 6.

(p) Perkins' Fait. 137; and Com. Dig. Fait. A. 3.

(q) Co. Litt. 36, a.

(1) [The delivery of every deed must be proved, as well as the execution of it, being an essential requisite to its validity, (*Jackson v. Dunlap*, 1 Johns. Cas. 114); but the possession of a bond being with the obligee is sufficient evidence of a delivery. *Clark v. Ray*, 1 Har. & J. 323. *S. P. Mallory v. Aspinwall*, 2 Day, 280, in case of an ancient deed.

A formal delivery is not essential, if there be acts evincing an intention to deliver. *Goodrich v. Walker*, 1 Johns. Cas. 250. A deed may be delivered by words, or by acts without words—and may be good even if delivered to a stranger without special authority, if intended for the use of the grantee. *Verplank v. Sterry & ux.* 12 Johns. 536. If a deed has once been delivered, so as to take effect, a second delivery can be of no avail. *ibid.*

Where one, after executing a deed, left it on the table where it remained all night, and in the morning took it up and put it away; it was held there was no evidence of a delivery. *Ward's Ex'rs. v. Ward*, 2 Hayw. 226.

Where A. living in New York, agreed with B. of Massachusetts, to give him a deed of his farm, as security for a debt, and accordingly executed a deed to B. in 1808, and left it at the clerk's office to be recorded—neither the grantee nor any person in his behalf being present to receive it—and the grantee died in 1809, and in 1810, A. sent the deed to his heir; it was held that there was no delivery. *Jackson v. Phipps*, 12 Johns. 418. See also *Maynard v. Maynard & al.* 10 Mass. Rep. 456. But a delivery of a deed to a third person, for the use of the grantee, and without his knowledge, becomes a valid delivery on the subsequent assent of the grantee, which relates back to the original time of delivery. *Ruggles v. Lawson & al.* 13 Johns. 285. *Belden v. Carter*, 4 Day, 66. *Hatch v. Hatch*, 9 Mass. Rep. 307. *Commonwealth v. Seldon & al.* 5 Munf. 160. *Harrison & al. v. Trustees of Phillips Academy*, 12 Mass. Rep. 456. See also *Beekman v. Frost*, 18 Johns. 544. 1 Johns. Ch. Rep. 288. *Souverbye v. Arden*, 1 Johns. Ch. Rep. 240. *The Trustees of the Methodist Church v. Jaques*, *ibid.* 450. *Bickford v. Daniels*, 2 N. Hamp. Rep. 71.]

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it shall be so, he cannot by any subsequent words explain his intent to be otherwise (r).

One who executes a deed for another, under a power of attorney, must execute it in the name of the principal; but no particular form of words is essential (s) (1).

Variance.

In general, where an action is brought against one of several covenantors or obligors, the defendant cannot take advantage of it except by plea in abatement (t).

* 478 If the plaintiff declare on a bond made by two, it is * no variance under the plea of *non est factum* that the bond was made by three (u). But if one of several covenantees or obligees bring an action without averring that the rest are dead, the defendant may take advantage of it at the trial, as a variance under the plea of *non est factum* (x).

If the deed appear to be razed or interlined, it is a question for the Jury whether it was the individual contract delivered by the party (y).

A variance between the real name of the defendant from that which is given him in the deed, and by which he is sued, is immaterial (z).

If the deed read vary from that described in the declara-

(r) Com. Dig. Fait. A. 3. But *qu.* whether the delivery is absolute where the deed is delivered to the obligee as an escrow to be his deed on performance of a condition. Ibid. [See *Johnson & al. v. Baker*, 4 B. & A. 440.]

(s) *Wilks v. Back*, 2 East, 142.

(t) See the cases, 1 Will. Saund. 154, n. 1. *Whelpdale's case*, 5 Co. 119. *Gilbert v. Bath*, 1 Str. 503.

(u) *South v. Tanner*, 2 Taunt. 254.

(x) 1 Will. Saund. 154, and the cases there cited.

(y) B. N. P. 267. 10 Co. 92. Formerly, the Judges decided upon the profert, or view of the deed, whether it was void by reason of erasure or interlineation; but when deeds grew voluminous, they found it inconvenient to decide upon demurrer, and referred it to a Jury. B. N. P. 267.

(z) A party ought to be sued by the name given him in the bond, &c. A declaration against him by his right name, stating that in another name he executed the bond, has been held to be bad. *Gould v. Barnes*, 3 Taunt. 504.

(1) [It is indifferent whether an attorney sign a deed "B. W. atorney for R. C.," or "R. C. by B. W. his attorney." *Jones's Devises v. Carter*, 4 Hen. & Mun. 184. But where an attorney signed *his own name*, without adding any reference to his constituent, it was held that the deed was inoperative, although it recited a proper letter of attorney, and although the concluding words of the deed were—"In testimony whereof, I have hereunto set the name and seal of the said J."—who had executed the letter of attorney. *Elwell v. Shaw*, 16 Mass. Rep. 42. 1 Greenleaf, 339. S. C.]

tion, in legal effect the variance will be fatal (a). As, if it describe the consideration for the defendant's covenant improperly (b); or allege that as absolute which is merely qualified and conditional (c).

Variance.

Where the declaration in setting out one of the several covenants in a lease, on which breaches were assigned, described it to be the Cellar Beer Field, by * mistake for the * 479 Aller Beer Field, the variance was held to be fatal, as amounting to a misdescription of the deed declared on (d).

Where the defendant prayed *oyer* of the condition of a bond, which was for the payment of 100*l.* by instalments, till the said sum be paid, the defendant pleaded *non est factum*; and it appeared that the word *hundred*, where it should have occurred the second time in the condition of the bond, had been omitted, but had afterwards been inserted without the defendant's knowledge, it was held, that although the alteration did not avoid the instrument, yet, that it caused such a variance between the condition set out on the record on *oyer*, and the condition of the bond produced, that the plaintiff could not recover (e) (1).

The defendant may give in evidence any matter which shows either, 1st, that the deed was originally void, or 2ndly, that it was avoided by matter subsequent before the plea; for the plea is in the present tense, and if it has been avoided it was not the defendant's deed at the time of pleading (f). Evidence for defendant.

1st. That it was originally void. As where a bail-bond is taken after the return of the writ (g). That it is a for-

(a) See *Swallow v. Beaumont*, *supra*, 431. *Sands v. Ledger*, 2 *Ld. Raym.* 792. *Howell v. Richards*, 11 *East*, 633. *Browning v. Wright*, 2 *B. & P.* 19.

(b) *Swallow v. Beaumont*, 2 *B. & A.* 765.

(c) See *Gordon v. Gordon*, 1 *Starkie's C.* 204. 4 *M. & S.* 470. 9 *East*, 188. 1 *Camp.* 195. 4 *Camp.* 20. 14 *East*, 568. 7 *Taunt.* 385. 1 *B. & A.* 57. And tit. *Variance*.

(d) *Pitt v. Green*, 9 *East*, 188.

(e) *Waugh v. Russell*, 1 *Marsh.* 214. [5 *Taunt.* 707. *S. C.*]

(f) *Gilb. L. Ev.* 173, 2d edit. [In *Manwood v. Harris*, *Savile*, 71, it was held that matter subsequent to the execution of the deed, which avoids it, must be pleaded, and cannot be given in evidence under the issue of *non est factum*. That case, however, is not law.]

(g) *Supra*, tit. *Bail-bond*.

(1) A variance in date, between the bond declared upon and that produced on *oyer*, is matter of substance and fatal upon the plaintiffs special demurrer to the defendant's bad rejoinder. *Cooke v. Graham's Adm'r.* 3 *Granch*, 229.]

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gery ; that he was made to sign it when he was so drunk that he did not know what he did (*h*) ; that he was a lunatic (*i*) ; that it was obtained by fraud, and without any real assent of the mind, having been falsely read over to him, being a blind man, or unable to read (*k*) (1) ; that she was a feme covert (*l*) ; that the deed * was delivered as an *escrow*, upon a condition not yet performed (*m*) ; that it was delivered to a stranger for the use of the plaintiff, who refused it, for the refusal deraigns the bond (*n*) ; that it was made to a feme covert, and that the husband disagreed, and refused to accept it (*o*) ; that the deed was cancelled before the plea ; that a material erasure was made in the deed, or that the seal was torn off before the plea (*p*) ; but this, it seems, is but presumptive evidence of such an act on the part of the obligee as will cancel the deed, for the latter may show that the seal was torn off by accident (*q*) ; or that the alteration was made by a stranger in a point not material, and without his privity (*r*). But an alteration by the obligee himself, even in an immaterial point, will, it is said, avoid the deed (*s*). An alteration in any one cove-

(*h*) *Cole v. Robins*, B. N. P. 172. [*Wigglesworth v. Steers & al.* 1 Hen. & Mun. 69. *King's Ex'rs. v. Bryant's Ex'rs.* 2 Hayw. 394. *Curtis v. Hall*, 1 Southard's Rep. 361.]

(*i*) B. N. P. 172. *Yates v. Boen*, Str. 1104.

(*k*) B. N. P. 172. [*Armstrong & al. v. Hall*, 1 Coxe's Rep. 178, *Jackson v. Hayner*, 12 Johns. 469.]

(*l*) Ibid. 2 Wils. 352. 3 Burr. 1805. 1 Ld. Ray. 313.

(*m*) B. N. P. 172. 2 Roll. Ab. 683. 5 Co. 119.

(*n*) 5 Co. 119, b.

(*o*) Ibid.

(*p*) Formerly, the Court decided on view of the deed upon proffer made, whether it was void or not from rasure (10 Co. 92) ; and they held that a rased or interlined deed was void, because they could not sufficiently collect the intention of the obligor (10 Co. 92. Bac. Ab. Ev. F. 649). But when deeds grew to be voluminous, they were not discharged on demurrer, but the defendant was put to his plea of *non est factum*. Ibid.

(*q*) B. N. P. 172.

(*r*) Ibid. 171. But see 11 Co. 27, and 2 Str. 1160 ; where it is laid down, that an alteration by a stranger in a material point will avoid the deed, because the witnesses cannot then say that it is the deed of the party. *Vide supra*, 476. note (*g*).

(*s*) 11 Co. 27, *Pigott's case*. B. N. P. 267 ; *vide supra*, 476.

(1) [Or that a different instrument was substituted for that which the defendant supposed he was executing. *Moore v. Carpenter*, Cam. & Nor. 553. *Van Valkenburgh v. Rouk*, 12 Johns. 337.]

nant will avoid the whole deed, for the deed is not the same unless all the covenants be the same (*t*).

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Where the deed is a joint one (*u*), or both joint and *several (*x*), the defendant who is sued, may show that the seal of one of the obligors has been torn off, for the manner of the obligation becomes different, and a presumption arises that the obligee has been satisfied. But it is otherwise, where the obligation is entirely several (*y*).

Proof by defendant.
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Where *A.*, with a blank left after his name, is bound to *B.* and afterwards the name of *C.* is added as a joint obligor, the bond is not avoided, for the addition does not alter the contract of *A.* who was bound to pay the money independently of any addition (*z*) (1).

Where a bond was made to *C.* with blanks left for the christian name and addition, which were filled up afterwards with the assent of the parties, it was held that the bond was void (*a*). And in general, if blanks be left at the time of execution, and be afterwards filled up, the deed will be avoided, for it is no longer the same contract that was sealed and delivered (*b*); but an immaterial addition will not avoid the deed (*c*). The defendant may also show that the deed after execution was altered, and without any new stamp (*d*).

(*t*) 11 Co. 27, 28, b. B. N. P. 237.

(*u*) Noy, 172. B. N. P. 268. 11 Co. 28. 2 Show. 28, 29. 2 Roll. Rep. 39, 40. 5 Co. 23, a. Cro. Eliz. 546. Doc. Pl. 260. 262, 263. Poph. 161. 2 Roll. R. 30.

(*x*) March, 125. 2 Show. 29. Bac. Ab. Ev. 652. B. N. P. [268,

(*y*) Ibid.

(*z*) 2 Lev. 35. 2 Keb. 872. 881. Moor, 547. 619. Cro. Eliz. 627. B. N. P. 281. [2 Ch. Rep. 187.]

(*a*) 2 Roll. R. 39, 40.

(*b*) Ibid. 2 Roll. Ab. 29. B. N. P. 281.

(*c*) 1 Vent. 185.

(*d*) 1 Ford, 84. See tit. Stamp.

(1) [*Texira v. Evans*, cited by Wilson J. 1 Anst. 228. *Matson v. Booth*, 5 M. & S. 223. *Hunt v. Adams*, 6 Mass. Rep. 519. *Smith v. Crooker & al.* 5 Mass. Rep. 538. *Speake & al. v. U. States*, 9 Cranch, 28. *Whiting v. Daniel*, 1 Hen. & Mun. 391. *Wooley & al. v. Constant*, 4 Johns. 55—where it is held that by consent of parties, alterations may be made in a deed by adding, or by erasing and substituting obligors' names, &c.; and that parol evidence of such consent is admissible, and that it is immaterial whether the consent be given before or after the execution of the deed—and that consent may in some cases be implied from the nature of the alteration, as well as expressed. Sed vide *Moore & al. v. Lessee of Bickham & al.* 4 Binney, 1. See also *Oneale v. Long*, 4 Cranch, 60.]

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Evidence for
the defendant.
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The defendant cannot, under this plea, give any matter in evidence which avoids the deed either at common law or by statute, unless it impeach the execution and continuance of the deed (*e*); and therefore cannot give in evidence that the deed is void for * usury (*f*), or that the bond was delivered to the plaintiff himself upon a condition not performed (*g*); or to a stranger, but not as an *escrow* (*h*). So, in all cases where the deed is merely voidable, but not void, the matter must be specially pleaded, and is not evidence under this plea (*i*), as for infancy (*k*), duress, or where it was obtained by threats (*l*); nor can he read the condition of the bond to show that it is void, as being in restraint of marriage, or for any other illegality (*m*).

Where the plea is *non est factum* generally, the proof lies upon the plaintiff, but where the plea shows that the deed is void for special matter, the issue is on the defendant (*n*).

Plea of duress.

The usual pleas in avoidance of a deed, are, that it was obtained by duress, which will be supported by proof that he was forced to give the bond by a wrongful imprisonment (*o*), by threats, and then proof of a menace of life, member, mayhem, or imprisonment, is sufficient, it is said, to avoid a deed (*p*); but a threat of battery, or of injury to the party's house or goods is, it is said, insufficient, because the party may recover damages for the injury (*q*); this, however, is clearly a very inadequate reason for the distinction, and may be frequently false in fact. Under the plea of * 483 * duress, it is a question for the Jury, whether the act of the party was voluntary, or was the result of terror and

(*e*) *Cotton v. Goodright*, 2 Bl. Rep. 1008. 5 Co. 119, a. Com. Dig. Pleader, 2 W. 18. 2 Starkie's C. 35, *Harmer v. Wright*.

(*f*) 5 Co. 119, a. Com. Dig. Pleader, 2 W. 18.

(*g*) 9 Co. 137, a.

(*h*) *Dyer*, 167, b.

(*i*) Com. Dig. Pleader, 2 W. 18.

(*k*) B. N. P. 172. 12 Mod. 609. Per *Ld. Mansfield*, 3 Burr. 1805. 1 *Ld. Raym.* 315. But where infancy actually avoids the deed, it is evidence on the plea of *non est factum*. Per *Eyre*, J. 2 H. B. 515.

(*l*) 5 Co. 119, a. Com. Dig. Pleader, 2 W. 18.

(*m*) Bl. Rep. 1008.

(*n*) 6 Mod. 218. Com. Dig. Pleader, 2 W. 18. 3 Keb. 142.

(*o*) 2 Inst. 482. Com. Dig. Pleader, 2 W. 19. But this is no plea, if the deed be acknowledged by the defendant to be enrolled of record. 2 Roll. Ab. 862.

(*p*) 2 Inst. 483. Cl. Ass. 72. Com. Dig. Pleader, 2 W. 20.

(*q*) 2 Inst. 483.

apprehension. So the defendant, in avoidance of the deed, may plead coverture (*r*) or infancy (*s*), or that the deed was void under the statute of usury, or against gaming, or for other illegal matter.

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Pleas in
avoidance.

Other pleas in answer are of a tender; *solvit ad*, or *post diem* (*u*); or a release (*x*), which must be produced and proved as a deed; performance of the condition; a defeazance, which must be proved as a deed, if denied by the replication (*y*); eviction (*z*); expulsion (*a*).

It is a general rule, that parties to a deed and those who are privy in estate, can found no claim upon the deed without showing it to the Court (*b*); and where the contract creates the obligation, it can neither be pleaded nor given in evidence unless it be under seal, but it is otherwise where the interest vests, although the deed has no continuance (*c*).

Proof by, when
necessary.

Where an estate is claimed by act of law, the party may make his claim without showing the deeds; as where the party is tenant in dower, or by elegit, or guardian in chivalry, for where the law creates an estate, but does not give custody of the deeds, it must allow the estate to be defended without them (*d*). But a tenant by the curtesy cannot claim an estate lying *in grant, without deed, * 484 because he has the custody of the deeds in right of his wife (*e*).

Where the plea is, that *J. S.* was enfeoffed by deed. it seems that a parol feoffment cannot be proved; for if the Jury were to find the issue for the defendant the plaintiff would be for ever after estopped, although there was no such deed (*f*). So a demise may be proved by parol, for it may be by livery; but if it be alleged to have been by deed it must be proved by deed (*g*). The deliverer will

(*r*) See tit. *Husband & Wife*.

(*s*) See tit. *Infant*.

(*t*) See tit. *Tender*.

(*u*) See tit. *Payment*.

(*x*) See tit. *Release*.

(*y*) Com. Dig. Pleader, 2 W. 35. Mo. 573.

(*z*) *Vide supra*, 476.

(*a*) *Supra*, 435.

(*b*) Co. Litt. 267. 10 Co. 92.

(*c*) 2 Roll. R. 39, 40. 2 Bulst. 246.

(*d*) 10 Co. 93, 94.

(*e*) 10 Co. 94. Co. Litt. 226, a.

(*f*) 2 Roll. Ab. 682.

(*g*) *Ibid*.

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IV.Proof by, when
necessary.

be *estopped* by the livery, unless he produce the indenture to show that it was merely conditional.

A deed of feoffment is evidence to prove livery, where the party has had possession (*h*), but if possession has not gone along with the deed, livery must be proved under a plea of feoffment (*i*). Upon a plea that *J. S.* enfeoffed the defendant without saying *per indenturam*, the indenture is evidence of the feoffment (*k*). A deed of feoffment may be given in evidence as a release, for where the party is already in possession the deed alone will be a sufficient contract to transfer a right (*l*). Where a thing lies in livery, a deed is evidence, although the seal be torn off, for the deed is only the evidence of transferring the possession, which being once transferred by livery does not return (*m*); but it is otherwise where the thing to which title is claimed (as a watercourse) lies in grant, for a

* 485 * man cannot claim a thing lying in soleman agreement, but by solemn agreement (*n*).

The production of an original lease for a long term of years, coupled with a possession for seventy years, was held to be presumptive evidence of the execution of all mesne assignments (*o*).

DEPOSITIONS.

THE admissibility and effect of depositions in civil cases have already been considered (*p*); it remains to notice those which are made according to the statutes in criminal proceedings.

Depositions
under the sta-
tute of Ph. &
Mary.

The stat. 1 & 2 Phil. and Mary, c. 13, which is intitled 'An act touching bailment of persons,' enacts, that "Justices, before whom any such prisoner is brought, for any manslaughter or felony, before any bailment or mainprize, shall take the examination of the said prisoner, and informations of them that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall be put in writing be-

(*h*) Roll. R. 192. 227. Tri. per Pais, 209. Bac. Ab. Ev. F. 648.

(*i*) Bl. Comm. 67.

(*k*) 2 Roll. Ab. 682.

(*l*) Tri. per Pais, 209. Bac. Ab. Ev. F. 649.

(*m*) Palm. 403. 1 Mod. 11. 1 Vent. 14. 2 Keb. 556. 2 Lev. 220. 2 Show. 28. The livery being indorsed. Roll. Ab. 29.

(*n*) 3 Bulst. 79. 1 Roll. R. 188.

(*o*) 2 Bl. R. 1228.

(*p*) *Supra*, Vol. I. p. 261.

fore they make the same bailment; which said examination, together with the said bailment, the said Justices shall certify at the next general gaol delivery (q) to be holden within the limits of their commission."

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* Sect. 5, directs that every coroner, upon any inquisition before him found, &c. shall put in writing the effect of the evidence given to the Jury before him, being material, and shall certify the same, &c.

In cases of
felony.
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The 2nd and 3rd Phil. & Mary, c. 10, directs in similar terms, that Justices of the peace shall take such examination and information, and put the same in writing within two days, and certify the same, &c. although the prisoner be committed.

The object of the Legislature in framing these statutes, was to enable the Court to see whether a prisoner had been properly admitted to bail; and whether the witnesses are consistent or contradictory in the evidence which they give, without manifesting any intention to alter the law of evidence (r). But such depositions in case of felony, being warranted by those statutes, become evidence in particular cases, upon general principles of evidence, that objection having been removed by the statutes which would otherwise have operated to their exclusion, namely, that they were extra-judicial.

To warrant such evidence, it is essential to prove by the Justice, coroner, or his clerk, &c. that the depositions contain the substance of the information on oath (s). It is not necessary to prove that the depositions were signed by the witnesses (t). Previous proof.

It must also be previously proved that the witness is dead (u), or that he has been kept away by the practices * of the prisoner (x), or, as *has been said* (y), that he is una- * 487

(q) If the prisoner be taken before a magistrate of a different county from that in which the offence was committed, the informations, &c. should be transmitted to the latter county, and will, it is said, be evidence, although the magistrate had no original cognizance of the offence. Cro. Car. 213. 2 Hale, 285. Dalton's Just, c. 111. p. 299.

(r) Per Grose, J. *Lambe's case*, Leach's C. C. L. 3d edit. 625. 3 T. R. 710. 722.

(s) 2 Hale's P. C. 284.

(t) *R. v. Fleming & Windham*, 2 Leach, 996.

(u) *Westbeer's case*, Leach, 14. And see *Bromwich's case*, 1 Lev. 180. 1 Salk. 281. B. N. P. 42.

(x) *Harrison's case*, 4 St. Tr. 492. Fost. 337. Keb. 55.

(y) 2 Hale, 52. Phill. on Ev. 371. But this has been held even in a civil case to be insufficient.

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seize, or sue for the same, any person may bring *detinue* for the goods, for the bringing the action vests a property in him (*h*). An heir may maintain *detinue* for an heir-loom (*i*).

The plaintiff must prove an actual possession of the goods by the defendant (*k*); hence *detinue* does not lie against the executor of a bailee who has destroyed the chattel (*l*). And if there be several executors, and one only has the possession, the action must be brought against him alone (*m*).

- * 495 If goods be delivered to husband and wife, the * *detinue* must be against the husband only (*n*); but if goods come to a feme covert before marriage, the action must be brought against the husband and wife (*o*). In *detinue* for a bond a variance as to the sum will be material (*p*).

Under the plea of *non detinet*, the defendant may give in evidence any matter which shows that he does not detain the plaintiff's goods (*q*) (1), as for instance, a gift by the plaintiff, but he cannot give in evidence that the goods were delivered by way of pledge, as he may in trover (*r*).

The Jury must find the value of every particular thing demanded, for the judgment is to recover the thing itself, or the value of it, and if the Jury find damages and costs, and no value, the defect cannot, it is said, be supplied by a writ of inquiry (*s*) (2).

(*h*) 1 Salk. 223. B. N. P. 51. It has been said, that *detinue* does not lie where the property has been taken by trespass (Sel. N. P. tit. *Detinue*, 6 Hen. VII. 9, a. Bro. Ab. *Detinue*, pl. 53,) because, as is said, the property is devested by the trespass, *tam. qu.*

(*i*) Bro. Ab. *Detinue*, pl. 30.

(*k*) 2 Roll. Ab. 703. *Wilkins v. Despard*, 5 T. R. 112.

(*l*) B. N. P. 50. [Or detained it. *Walker v. Hawkins*, 1 Hayw. 398.]

(*m*) Bro. Ab. *Detinue*, pl. 19.

(*n*) Roll. R. 128. B. N. P. 51.

(*o*) Co. Litt. 351. B. N. P. 51, *i. e. semble*, for the detention before the marriage. [*Johnson v. Pasteur*, 2 Hayw. 306.]

(*p*) 2 Roll. Ab. 703. B. N. P. 51.

(*q*) Co. Litt. 283. B. N. P. 51.

(*r*) B. N. P. 51.

(*s*) Ibid. 10 Co. 119. But they may find the aggregate value of that which consists of a number of particulars, as a flock of sheep, &c. Ibid.

(1) In *detinue* for slaves, parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of *non detinet*. *Stratton v. Minnis*, 2 Munf. 329. See also *Elam v. Bass's Ex'rs*. 4 Munf. 301.]

(2) [If on a declaration for several slaves (separate values being

An action of *trespass* is a proper form in all cases where the distress is either wholly illegal (*t*) or irregular, unless it be otherwise provided by a statute.

Where a distress has been irregularly made for rent, or for poor-rates, the action is in case or trespass, * according to the nature of the irregularity complained of (*u*). * 496

In an action on the case for an illegal or irregular dis-

(*t*) If the landlord turn the plaintiff's family out of possession, and continues in possession after the rent is paid, he is a trespasser. *Etherton v. Popplewell*, 1 East, 139.

(*u*) By stat. 17 Geo. II. c. 38, s. 8, "Where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the warrant of appointment of overseers, or in the rate or assessment; or in the warrant of distress thereupon; nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, with full costs; unless tender of amends be made before action brought."

By stat. 11 Geo. II, c. 19, s. 19, "Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, at the election of the plaintiff; and if he recover, he shall have full costs." But by sec. 20 of the same stat. it is provided; "that no tenant or lessee shall recover in such action, if tender of amends has been made before action brought."

A trader, after an act of bankruptcy, takes a lease, the goods on the premises are liable to distress. *Buckley v. Taylor*, 2 T. R. 600. Where by the custom of the country half a year's rent is due on the day of entry, and the tenant agrees to pay half a year's rent in advance, a year's rent becomes due on entry. *Ibid*. And the sheriff is bound to leave a year's rent. *Ibid*; and see *Harrison v. Barry*, 7 Price, 690. A commission of bankrupt is not an execution within the statute of Anne.—*Lee v. Lopes*, 15 East, 230.

A distress-warrant for seven rates, one of which has been quashed, is void as to all. *Hurrell v. Wink*, 2 Moore, 417. [S. C. 8 Taunt. 369.]

laid) the jury find a joint value, it is error. *Higginbotham v. Rucker*, 2 Call, 313. A writ of enquiry to ascertain their respective values should be awarded. *Cornwell v. Truss*, 2 Munf. 195. Failing to lay a separate value, as to each slave demanded, is fatal on demurrer, but is cured by a verdict severing the values. *Holliday & ux. v. Littlepage*, 2 Munf. 539. It is not error, if the jury find general damages for detaining several slaves; but the alternative value of each ought to be separately found. *ibid*.]

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IV.Cause of ac-
tion.

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treass, the particular *gravamen* is specified in the declaration, which governs the nature of the proof.

The most usual causes of action are for distraining where no rent was due (*x*), or for more than was due (*y*), or for an excessive distress (*z*), or driving a *distress above three miles out of the hundred (*o*); impounding goods distrained off the premises, and not giving due notice (*a*); refusing to restore the goods distrained for rent, after tender of the rent and costs (*b*); selling the distress within five days after notice (*c*); not removing the goods distrained within a reasonable time after the lapse of five days (*d*); for *not

(*x*) By 2 Will. & Mary, sess. 1, c. 5, s. 5. The owner may, in an action of trespass or case, recover double the value of the goods and full costs.

(*y*) This is either at common law or under the stat. of Marl. 52 Hen. III. c. 4.

(*z*) Trespass does not lie for taking an excessive distress for rent (*Lynn v. Moody*, Fitzg. 85. 2 Str. 851. *Hutchins v. Chambers*, 1 Burr. 590), unless gold and silver be taken to excess, for they are of known value. Ibid; and per Ld. Kenyon, *Crowther v. Ramsbottom*, 7 T. R. 658.

(*o*) 1 & 2 Phil. & Mary, c. 12, which entitles the party aggrieved to 5*l.* and treble damages.

(*a*) 2 Will. & Mary, c. 5, s. 2. 11 Geo. II. c. 19, s. 10.

(*b*) A tender of the rent upon the land before the distress makes the distress tortious; a tender after the distress, and before the impounding, makes the subsequent detainer, but not the taking, wrongful; a tender after the taking and impounding does not make either the one or the other wrongful; but in the case of a distress for rent, a sale after tender of the rent, and costs, is illegal, under the equity of the stat. 2 Will. & Mary, c. 5. An action on the case will not lie for detaining the plaintiff's cattle in the pound after tender of amends made subsequent to the impounding (*Anscomb v. Shore*, 1 Camp. 285. 1 Taunt. 261), nor where the tender is made after the distress, but before the impounding, for the proper action is replevin or trespass. *Lindon v. Hooper*, Cowp. 411. And see 6 T. R. 299.

(*c*) See the stat. 2 Will. & Mary, sess. 1. c. 5, s. 2, *infra*, 499.

(*d*) Although there are precedents of declarations in case for not removing a distress from the premises after the expiration of five days (see Chitty on Pleadings), yet it seems to be clear that the remedy is in trespass, and not case. As the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, and the stat. 11 Geo. II, c. 19, s. 10, authorize an appraisement and sale of the goods upon the premises after the expiration of the five days, it follows that the landlord is to be allowed a reasonable time for doing this, the statutes having fixed no particular time, and it being impossible, where each case must depend so much on its own circumstances, for the Legislature to prescribe any. What shall be a reasonable time, under the circumstances of the particular case, is a question for the Jury. In the late case of *Pitt v. Adams* (Sittings after Mich. Term, at Westm. 1 Geo.

selling for the best price (e); for not leaving the overplus arising from the sale of a distress with the sheriff (f) or constable.

A count in trover is usually added to the special count, and therefore, mere proof of the defendant's seizure and sale of the plaintiff's goods will usually be sufficient to throw upon the defendant the necessity of justifying the act (g). Proof by the plaintiff.

The more correct course seems to be that the plaintiff should enter at once upon the whole of his case. If he alleges a distress for rent, and complains of an irregularity committed in the course of that distress, he should prove the defendant's hand-writing to the notice of distress, if such a notice has been served; this will usually be evidence of the tenancy, the *quantum* of rent, and the sum in arrear, if it be correct as to such particulars; if it be not correct, and the fact should be material, the defendant may prove the amount of the rent by evidence of the original contract, or by evidence of receipts given by the defendant, or of payments to him.

In an action for an excessive distress, it is not necessary to prove express malice, it should, however, appear that the excess was considerable (h). Excessive distress.

IV.) Abbott, L. C. J. left it so to the Jury, and the Court of K. B. afterwards held the direction to be right. If the party remain in possession beyond a reasonable time he is a trespasser (*ibid*). After the stat. 2 Will. & Mary, sess. 1. c. 5, s. 2, which gives the power of sale after the expiration of five days, and previous to the stat. 11 Geo. II. c. 19, s. 10, which authorized a sale on the premises, the landlord was considered to be a trespasser if he did not remove the distress at the end of five days. *Griffin v. Scott*, Str. 717. *Vide etiam*, *Winterbourn v. Morgan*, 11 East, 395; *Wallace v. King*, 1 H. B. 13; *Etherton v. Popplewell*, 1 East, 139; *Pitt v. Shew*, 4 B. & A. 206.

Case will not lie in respect of a seizure and sale of growing crops before they are ripe, for the sale is void. *Owen v. Legh*, 3 B. & A. 470.

The statute 57 G. 3, c. 93, sect. 7, which gives costs of distress, where the amount does not exceed 20*l*. directs, that evidence of the justice's signature shall be proof of the judgment.

(e) According to the stat. 2 Will. & Mary, c. 5, s. 2. But the price at which the goods were appraised will be presumed to be the best, until the contrary appear. 4 Mod. 390. Com. Dig. *Distress*, D. 8.

(f) According to the stat. 2 Will. & Mary, c. 5, s. 2.

(g) But trover will not lie for an irregularity in the sale where the defendant was entitled to distrain, although he sells before the expiration of the five days. *Wallace v. King*, 1 H. B. 13.

(h) *Field v. Mitchell*, 6 Esp. C. 71.

PART
IV.

Proof by the
defendant.

* 500

* In an action on the case the defendant may, under the general issue, give any evidence in justification of his act. If the distress were for rent he should prove the tenancy, either by means of the contract, or evidence of the payment of rent by the plaintiff, or some other admission by him of the tenancy (*i*); the authority to the broker or other agent to distrain, for the particular cause; notice of distress according to the statute (*k*), by means of an examined copy, after proof of notice to produce the original; a regular appraisement by two sworn appraisers (*l*) at the expiration of five days after the notice (*m*); the sale of the goods for the best price that could be got (*n*); the amount of the costs; the leaving the overplus, after payment of the rent and costs, with the sheriff or constable.

In an action under the stat. 11 Geo. II, c. 19 (*o*), for a

(*i*) And for this purpose, notice should be given to him to produce the lease or agreement under which he holds the receipts for rent, &c.

(*k*) By the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, it is enacted, "That where any goods or chattels shall be distrained for any rent reserved, and due upon any contract, and the tenant or owner of the goods shall not within five days* next after such distress, and notice thereof, with the cause of such taking, left at the chief mansion-house, or other most notorious place on the premises† charged with the rent, replevy the same, the person distraining may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish, or place, where the distress is taken, cause the distress to be appraised by two sworn appraisers, whom such sheriff, &c. shall swear to appraise them truly, and after such appraisement, may sell the same towards satisfaction of the rent, and the charges of the distress and appraisement, leaving the overplus (if any) in the hands of the sheriff, &c. for the owner's use."

(*l*) See the stat. *supra*, note (*k*). An appraisement by a party who makes the distress is irregular. *Westwood v. Cowne*, 1 Starkie's C. 172.

(*m*) The five days are reckoned inclusive of the day of sale. *Wallace v. King*, 1 H. B. 13.

(*n*) *Supra*, note (*k*).

(*o*) By 11 Geo. II. c. 19, s. 1, "In case any tenant or lessee of lands or tenements, upon the demise whereof any rent is payable, shall fraudulently or clandestinely carry off his goods, to prevent the landlord from distraining, it shall be lawful for every landlord, or any person by him empowered, within thirty days next ensuing such carrying off, to seize such goods wherever the same shall be found,

* See note (*m*).

† As to the form of notice, see *Moss v. Gallimore*, Doug. 280. It need not state at what time the rent became due. *Ibid*.

‡ But notice delivered to the party himself is sufficient (*Walter v. Rumbal*, 1 Ld. Ray. 53), for it is the most effectual mode of giving notice.

PART
IV.Proof in an
action for a
fraudulent re-
moval, &c.

fraudulent and clandestine removal of goods, to prevent a distress, the plaintiff must prove 1st, that the rent was in arrear (*p*); 2dly, the fact of the removal of the goods, and their value; 3dly, that the removal was fraudulent or clandestine, and made with intent to prevent the landlord or lessor from distraining for the rent so due. It has been said, that it is necessary to prove that the removal was *secret and clandestine*, as well as that it was *fraudulent* (*q*); but this may well be doubted, the words of the statute being in the disjunctive. * The fraudulent intention, which is a question

* 501
Intention.

of fact for the Jury, is usually evidenced by the season and circumstances of the removal, as from its having been effected in the night-time, or at an unseasonable hour, with suddenness and precipitation after a threat of distraining, or with knowledge that a distress was intended.

In an action of trespass against the landlord, who has followed goods thus removed, he cannot give the fraudulent removal in evidence under the general issue (*r*), he must, on issue taken on the special justification, be prepared with the proofs already stated, and also show that

as a distress for the rent, and the same to sell or dispose of, as if the said goods had been distrained upon such premises." Sec. 1.

" Provided that no landlord shall seize goods sold *bona fide*, and for a valuable consideration, to any person not privy to such fraud." Sec. 2.

" If any such tenant shall fraudulently remove his goods, and any person shall knowingly assist such tenant in fraudulently conveying away his goods, or in concealing the same, all persons so offending shall forfeit to the landlord from whose estate such goods were carried off, double the value of the goods, to be recovered by action of debt in any of his Majesty's courts at Westminster, or in the courts of session in the counties palatine, or in the courts of grand sessions in Wales." Sec. 3.

(*p*) Unless rent be actually in arrear, the case is not within the stat. 2 Will. Saund. 284, a. n. (2). *Watson v. Main*, 3 Esp. C. 15.

(*q*) *Watson v. Main*, 3 Esp. C. 15, Cor. Eyre, C. J. The point was doubted in *Furneaux v. Fotherby*, 4 Camp. 136.

The statute, it seems, contemplates a removal by the tenant for his own benefit, and does not extend to a delivery to a creditor who presses for payment of a debt. *Bach v. Meats*, 5 M. & S. 200. Nor to the removal of the goods of a stranger. *Thornton v. Adams*, 5 M. & S. 38.

A withdrawing of cattle to a place where they were not likely to be found, is a concealment, although they were turned into an open field. *Stanley v. Wharton*, 8 Price, 301. An action lies, although the value does not exceed 50l.

(*r*) 2 Will. Saund. 284, a. 3 Esp. C. 15. *Furneaux v. Fotherby*, 4 Camp. 136. As to the justification by the landlord in an action of trespass, see *Trespass*.

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IV.

he distrained the goods within thirty days after the removal (s).

DISTURBANCE.

Proof by the
plaintiff.

IN an action on the case for the disturbance of the plaintiff in the enjoyment of incorporeal rights, such as of common (t), way (t), watercourse (t), office, seat at church, or other possession, the plaintiff must prove, under the plea of the general issue, not guilty, 1st, his right, as alleged in the declaration, 2dly, the defendant's interruption of that right, and 3dly, the damage sustained.

Proof of the
plaintiff's
right.

* 502

1st. The usual allegation in the declaration against a wrong-doer, is *habere debet*, without alleging a grant or prescription (u); and although he should allege a prescription, yet as it is but inducement, a variance from the prescription in evidence would not be material provided the plaintiff proved himself to be really *entitled to the right claimed (x); but the plaintiff must prove his right as claimed; as, if he claim a right as appurtenant to particular land, by proof that it has been used by the occupiers of that land, and it would be insufficient to prove that the right was enjoyed as appurtenant to other lands, or by the tenants of the manor (y).

The title to a right of this nature is proved, either 1st, by direct, or 2dly, more usually by presumptive evidence; by direct evidence, as by proof of a grant of a right of way, as appurtenant to a house or land, or of a right to a pew, as appurtenant to a house by proof of a faculty (z).

Presumptive
evidence.

2dly. Prescriptive rights can seldom be proved except by presumptions resulting from constant usage and enjoyment, where the right is of a private nature, and from such evidence, and also from reputation and traditionary declarations, where it is of a public nature (a).

An uninterrupted enjoyment of land for twenty years, in the claimant's own right, is *prima facie* evidence of title to the land itself (b), and an enjoyment of a privilege or ease-

(s) According to the stat. 11 Geo. II. c. 19, s. 1, 2.

(t) See these titles respectively.

(u) Com. Dig. *Action on the Case*, B. 1.

(x) Com. Dig. *Action on the Case*, B. 1. 1 Will. Saund. 346.

(y) See *Wilson v. Page*, 4 Esp. C. 71.

(z) See *Stocks v. Booth*, 1 T. R. 428.

(a) See Vol. I. p. 63.

(b) See tit. *Ejectment*.

ment in the lands of another affords also a presumption of a legal title by grant or prescription (c); this, however, is merely presumptive evidence of the right, which is liable to be rebutted by circumstances (d), and on the other hand, the presumption * of legal title may be inferred from a shorter period of possession (e).

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IV.

Proof of the
plaintiff's
right.
* 503

In an action for the disturbance of the plaintiff in his enjoyment of a pew in a church, proof of *possession* is sufficient against a wrong-doer, without proof of repairs done by the plaintiff (f); but as against the ordinary, who by the common law has the disposal of all the seats in the church, a special title or consideration must be alleged, and proved, as by proof of the building and repairing of the seat (g); the defendant may adduce evidence to rebut the presumption of right arising from such continued enjoyment, by evidence tending to explain it, and to show that the enjoyment was founded not on right but on leave and permission (h), or to destroy the prescription by proving the origin of the enjoyment, or showing that it has been interrupted, or that the prescription has been extinguished (i).

2dly. The disturbance may be alleged generally, and the particular manner of the disturbance be given in evidence (k).

Proof of the
disturbance.

3rdly. Proof of damage done to the smallest amount will be sufficient to support the action, although the plaintiff cannot prove damages to any specific and determinate amount, for if that were required where the plaintiff's right has been infringed, the wrong-doer * might gain a title by length of possession (l), as, if a stranger turn cattle on the

Of damage.

* 504

(c) See the cases, 2 Will. Saund. 175, a.; & *supra*, 387; and also tit. *Presumption*.

(d) See tit. *Presumption—Length of Time*.

(e) *Ibid.*; and see *Bealey v. Shaw*, 6 East, 214.

(f) *Kenrick v. Taylor*, 1 Wils. 326. [Sayer, 31. S. C.] The pew was there claimed by prescription, as appurtenant to a messuage. *Burton v. Bateman*, 1 Sid. 203.

(g) *Ibid.* and 3 Lev. 73. 2 Lev. 241. Salk. 551. 1 Bulst. 150. Godb. 200.

(h) See tit. *Presumption—Length of Time*. *Bradbury v. Grinsell*, 2 Will. Saund. 175, d. *Daniel v. North*, 11 East, 372. *Campbell v. Wilson*, 2 East, 294.

(i) See tit. *Prescription*.

(k) Cro. Jac. 606. *Bridgm.* 4. Com. Dig. *Action on Case*, B. 1.

(l) See the observations of Buller and Grose, Js., *Hobson v. Todd*, 4 T. R. 71. [Angell on Watercourses, 50–53.]

PART
IV.Proof of
damage.

land where the plaintiff has a right of common (m); for it is a damage to the plaintiff that he cannot enjoy the right of common in so ample and beneficial a manner as, but for the defendant's act, he might have done (n). So, if the defendant take from the common any manure dropped there by the cattle (o).

DURESS.

ACCORDING to Bracton, to constitute a duress in law it must not be *suspicio cujuslibet vani et meticulosi hominis, sed talis quæ possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum aut corporis cruciatum* (p). Lord Coke enumerates four instances in which a man may avoid his own act by reason of menaces; 1st, for fear of loss of life; 2dly, of member; 3dly, of mayhem; 4thly, of imprisonment (q) (1).

In the case of duress by imprisonment proof must be given that it is an unlawful imprisonment, for where the imprisonment is in due course of law, the maxim applies, *executio juris non habet injuriam* (r) (2), and therefore, where

(m) *Hobson v. Todd*, 4 T. R. 71.

(n) *Ibid.*

(o) *Pindar v. Wadsworth*, 2 East, 154; and *vide supra*, tit. Case, p. 360.

(p) Brac. l. 2, c. 5.

(q) 2 Inst. 483. 2 Roll. Ab. 124. Bac. Ab. *Duress*. A threat to beat or burn the house of the party, or to spoil his goods, it is said, is no duress (3), because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages (2 Inst. 481. 1 Bl. Comm. 131); but no suitable atonement can be made for loss of life or limb. *Ibid.* *Qu. & vide supra*, p. 482.

(r) Bac. Ab. *Duress*, 402. 3 Lev. 239.

(1) [One obligor cannot plead that the bond was obtained of his co-obligor by duress—But this rule does not apply to a bond taken by a sheriff from a defendant whom he has no right to detain in custody; and the co-obligor, or surety, may avail himself of the defence of duress, in a several action against him. *Thompson v. Lockwood*, 15 Johns. 256.]

(2) [If a defendant, under arrest, agree to submit the matter in controversy to arbitration, the agreement is not void on the ground of duress—nor would a final settlement be void. *Shephard v. Watrous*, 3 Caines' Rep. 168. See also *Watkins v. Baird*, 6 Mass. Rep. 511.]

(3) [In South Carolina, duress of goods, under some circumstances, will avoid a contract. *Sasportas v. Jennings*, 1 Bay, 470. *Collins v. Westbury*, 2 Bay, 211.]

a defendant after judgment against him * without any legal cause of action, procured the plaintiff to be arrested on legal process, and threatened that he should lie and perish in gaol, unless he executed a release, upon which, the plaintiff sealed one, and was discharged, it was held that the release could not be avoided by duress (s). But where one caused another to be arrested on a charge of felony, under a warrant from a justice of the peace, and discharged him upon his sealing a bond for 10*l.*, it was held that the deed might be avoided, the proceedings being a mere pretext to cover the deceit (t). Duress to avoid a deed must be pleaded specially (u) (1).

EJECTMENT.

- I. *Proof of the right of entry.*
- II. *Of the plaintiff's title in general.*
- III. *Of title by an administrator or executor.*
 - - - - *Assignee of Bankrupt (x).*
 - - - - *Conusee of statute-merchant, &c.*
 - - - - *Devisee, or tenant by.*
 - - - - *Elegit.*
 - - - - *Guardian.*
 - - - - *Heir at law.*
 - - - - *Landlord.*
 - - - - *Mortgagee.*
 - - - - *Rector.*
 - - - - *Tenant in common, joint tenant, &c.*
- * IV. *Variance.*
- V. *Defendant's possession.*
- VI. *Competency of Witnesses.*
- VII. *Trespass for mesne profits.*
- VIII. *Effect of judgment in evidence.*

THE declaration in ejectment comprises four allegations,—the title of the lessor of the plaintiff; a lease by

(s) Cor. Bridgman, C. J. Guildhall, 1 Lev. 69. [See 6 Mass. Rep. 512. 1 Hen. & Mun. 350, *Nelson v. Suddarth & al.*]

(t) Aleyn, 92. So ruled by Rolle upon the trial of an issue on the duress. See Bac. Ab. tit. *Duress*, 405. See tit. *Deed*.

(u) And the special manner must be set forth. 5 Co. 119. 2 Inst. 483.

(x) These proofs have already been considered; see tit. *Bankrupt*.

(1) [See *Inhabitants of Worcester v. Eaton*, 13 Mass. Rep. 371.]

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IV.

Actual entry.

nor where it has been levied by a bare tenant for years (g); nor where the son of a tenant by sufferance holds over (h); nor where the defendants had no possession of the estate when the fine was levied (i). And the receipt of rents previous to the time of levying a fine, is not evidence of possession without proof of title (k).

Proof of disability.

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Proof that the right is devested.

3rdly. If there has been no possession or actual entry within twenty years next after the time when title accrued, the lessor of the plaintiff must show in excuse of the want of entry, that he laboured under one of the disabilities specified in the stat. 21 Jac. I, c. 16, i. e. infancy, coverture, insanity, imprisonment, the being beyond seas (l). But it is a rule, that when the statute * has once begun to run no subsequent disability will affect its progress (m).

A right of possession and a right of entry are convertible terms (n). Hence if the right of entry be taken away the plaintiff cannot recover in ejectment. If A. disseize B. by wrongfully ousting him from his possession of land, B. may regain the possession by mere entry, and therefore may maintain ejectment. But where the disseisor died seised, the common law presumed a rightful seisin in favour of the heir, and the disseisee's right of entry was taken away or tolled. The common law annexed exceptions to this rule, where the claimant laboured under a legal disability during the life of the ancestor, as of infancy, coverture, insanity, imprisonment, or being beyond the realm. And by the stat. 32 Hen. VIII. c. 33, if the disseisor die within five years after the disseisin done, such disseisin shall not take away the right of the disseisee, although he has made no claim (o).

Evidence of a disseisin.

What is sufficient evidence of a disseisin is a question subject to some doubt. It seems originally to have meant an actual ouster, or dispossession of the owner, (in which all the definitions concur) by force, or in spite of the

(g) 18 Vin. 413. See also *Rowe v. Power*, 2 N. R. 1.

(h) *Doe v. Perkins*, 3 M. & S. 279.

(i) Andr. 326.

(k) *Smith v. Parkhurst*, Andr. 326.

(l) The same exceptions are contained in the Statute of Fines, 4 Hen. VII. c. 24.

(m) *Doe d. Durora v. Jones*, 4 T.R. 300. [See *Faw v. Robendeau's Ex'or.* 3 Cranch, 174.]

(n) 1 Burr. 89.

(o) The feoffee of the disseisor formerly acquired the right of possession by one year's non-claim; but the disseisee's right was capable of being kept alive by continued claims. Co. Litt. 256, a.

owner (p), for every dispossession was not a disseisin (q). The ambiguity seems to have arisen from an extension of the term disseisin for the sake of the easy remedy by assize, and its meaning was restricted or extended alternately for the benefit of the owner. To entitle him to the remedy by assize against a mere wrongful possessor, almost every obstruction * of the owner's right was construed into a disseisin. And again, in favour of the true owner, where he had been actually dispossessed, and to protect him against a claim founded on a wrong, the meaning of the term was restricted to an ouster in spite of the owner, or not *congeable* (r). This seems to have been the foundation of the doctrine of a disseisin at election (s).

Disseisin.

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To the action of ejectment a mere dispossession is usually immaterial, since the title of the lessor is the only question, an ouster being admitted, and therefore where the defendant contends that the entry has been barred by an actual disseisin, and descent cast, feoffment, &c. it seems to be necessary that he should prove a disseisin in the ancient and strict sense of a *personal* trespass (t), an actual expulsion (u) and putting out of the owner, and usurpation or the freehold tenure, and not merely such a disseisin as the owner might have considered to be such at his election, for the sake of the remedy by assize.

A lease for years made by a tenant at will (x); an entry into lands by one who pays rent, and claims to hold as tenant at will (y); the receipt by the tenant in tail of the rents of lands leased by his father to his younger brother for lives under a power (z), do not * operate as disseisins, * 514 except at the election of the owner for the sake of his re-

(p) See Litt. sec. 279. Co. Litt. 153, b.

(q) Co. Litt. 153, b.

(r) Litt. sec. 279.

(s) See *Blunden v. Baugh*, Cro. Car. 303. Pal. 201. Cro. Jac. 659. *Kynaston v. Parry*, Salop Ass. 25 March 1742; and Ld. Mansfield's observations in *Atkyns v. Horde*, 1 Burr. 89.

(t) Co. Litt. 153, b.

(u) Per Ld. Holt, Salk. 246; and per Ld. Ellenborough, 7 East, 312. And see *William v. Thomas*, 12 East, 141.

(x) *Pously v. Blackman*, Palm. 205. And therefore a subsequent devise by the original lessor was held to be good, because he had not elected to admit himself to be disseised.

(y) Cited Cro. Car. 303. And therefore the entry of the heir of the person so entering does not bar the entry of the heir the owner.

(z) *Kynaston v. Parry*, Salop. Ass. March 1742. And therefore a recovery suffered by the tenant in tail did not operate as a bar.

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IV.

Disseisin.

medy; and if he has made no such election, do not take away any right of entry.

The doctrine that a descent cast tolls the entry, does not apply to the case of a devisee, nor to any case where the party has no other remedy than by entry, for if it did he would be left without remedy (*a*); nor to customary or copyhold estates, where the freehold is in the lord (*b*), and therefore the devisee of a copyhold was not barred by a descent cast on the defendant by his father, who had been admitted as heir at law of the testatrix (*c*).

Title in general.

II. It is an inflexible rule, that the lessor of the plaintiff must entitle himself to recover by the strength of his own legal title, and that he can derive no support, either from any equitable title or from the weakness of his adversary. Thus it has been held, that an unsatisfied term for securing an annuity might be set up against the heir at law, although he merely claimed the premises as subject to the charge (*d*).

Evidence of a title consists either, 1st, in showing possession and acts of ownership from which a legal title may be presumed; or, 2ndly, in proving a particular title, as heir at law, devisee, executor, &c.

Presumptive,
from possession.

In the first place, long uninterrupted possession of an estate by a man and his ancestors is the strongest presumptive evidence of an estate in fee. Where lands have descended for many generations from father to son, such possession may be the only evidence, and it is the best presumptive evidence of title.

* 515 In the next place, in analogy to the stat. 21 Jac. I. * c. 16, a clear undisturbed possession of twenty years is evidence of an estate in fee, if no other title appear; and upon such evidence a plaintiff may recover in ejectment (*e*).

The presumption of title resulting from such possession of twenty years is liable to be rebutted by evidence that the possession was not adverse to the party legally entitled (*f*), or that the latter laboured under some disability

(*a*) Co. Litt. 240, b. and *Doe v. Danvers*, 7 East. 321. But *qu.* whether the devisee has not a remedy by writ *ex gravi querela*. And see the note by Hargrave & Butler.

(*b*) *Doe v. Danvers*, 7 East, 299.

(*c*) *Ibid.*

(*d*) *Doe v. Staple*, 2 T. R. 684.

(*e*) Per Ld. Mansfield, *Denn v. Barnard*, Cowp. 597; and per Holt, C. J. *Stokes v. Berry*, Salk. 421. See also *Catteris v. Cowper*, 4 Taunt. 547. Post. 1436. 1465, 6. and tit. *Prescription*.—*Grant*.

(*f*) *Supra*, 507.

when his right accrued, which continued down to a period within the twenty years (g).

Proof of a lease for a long period, coupled with possession, is evidence of a title to the remainder of the term, although the party cannot prove the mesne assignments from the original lessee (h).

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IV.

Presumptive,
from possession.

In cases where there has been no continued occupation of the premises, the possession and title may be evidenced by any acts of ownership which the circumstances of the case afford, such as cutting down trees (i), digging for turves, and getting stones.

It is to be presumed *prima facie*, that waste lands adjacent to a road belonging to the owner of the adjoining freehold, this presumption is of course liable to be rebutted by evidence of acts of ownership by the lord (k).

As the plaintiff must recover by virtue of his legal title, he will fail if it appear that a term of years has been created which is still outstanding in another, there being no count in the declaration on a demise by the trustee. It will not be sufficient however for the defendant to produce and prove a lease for 1000 years, unless he also prove a possession under it by the * trustee within the last twenty years, for otherwise a surrender of the term will be presumed (l). So proof of the execution of a mortgage-deed by the lessor of the plaintiff will be insufficient, unless it be also proved that the money was not paid at the day; but if the defendant prove the payment of interest subsequent to the day, and within twenty years, the plaintiff will be nonsuited (m).

Evidence for
the defendant.

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An indorsement on a lease of the receipt of principal and interest, and releasing the term, amounts to a surrender of the term. (n).

When the trusts of a term have been completely fulfilled, a surrender will be presumed; thus, where trustees were directed to convey to a devisee when he attained the age of twenty-one, it was held that the Jury might properly presume a conveyance at any time afterwards, and long before the expiration of twenty years (o). But if the sur-

(g) Ibid.

(h) *Earl v. Baxter*, 2 Bl. Rep. 1228.

(i) *Stanley v. White*, 14 East, 332.

(k) *Steele v. Prickett*, 2 Starkie's C. 463.

(l) B. N. P. 110.

(m) Ibid.

(n) Ibid. Such a note need not be stamped. Ibid.

(o) *England v. Slade*, 4 T. R. 682. *Doe v. Lloyd*, Peake's Ev. Appen.

PART
IV.Presumptive
evidence.Administrator
or executor.

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By executor.

Conusee of
statute-mer-
chant.

render of the outstanding term cannot be presumed, or if the existence of such a term be proved, and the Jury do not find a surrender, the plaintiff (there being no count on a demise by the trustee) cannot recover (*p*).

In ejectment, upon the assignment of a term to secure an annuity, an enrolment of the memorial is to be presumed, unless the contrary be shown (*q*).

III. An administrator, to prove his title to a term, should produce the letters of administration under the seal of the ecclesiastical court, or the entry in the book * of orders of the Court for the granting of administration (*r*), which may be proved by means of an examined copy. So he may show his title by producing an exemplification of the letters of administration (*s*). An executor proves his title by the production of the probate; the term vests in the executor (*t*) upon the death of the testator, before the probate, and he may recover on a demise laid after the death of the testator, but before probate (*u*). The lease to the testator or intestate must also be proved.

2. The plaintiff who claims as the conusee of a statute-merchant (*x*) must produce the recognizance, or an examined copy of it (*y*); an examined copy of the writ of *capias si laicus*, and return (*z*), and also an examined copy of the writ, and return of the extent and *liberari feci*.

An interest is vested in the conusee by the return to the

(*p*) *Goodtitle v. Jones*, 7 T. R. 47; and see *Doe v. Wrooths*, 5 East, 132. That an equitable title cannot prevail against a legal title in ejectment, see the above case, and the cases cited 5 East, 139. 1 Scho. & Lef. 67.

(*q*) Per Ld. Ellenborough, *Doe v. Mason*, 3 Camp. 7. [See *Doe v. Bingham*, 4 B. & A. 672.]

(*r*) 1 Lev. 25. 101. B. N. P. 138. 246. 8 East, 187.

(*s*) Ca. temp. Hard. 108. 8 East, 187.

(*t*) *R. v. Stone*, 6 T. R. 295. *R. v. Horseley*, 8 East, 410. B. N. P. 246.

(*u*) Com. Dig. *Administ.* B. 10. 2 Rol. 554, l. 15. 25. Salk. 303. But an administrator cannot commence an action before administration granted. 1 Salk. 303. Com. Dig. *Administ.* B. 19.

(*x*) See the stat. 11 Edw. I. and 13 Edw. I. st. 3.

(*y*) B. N. P. 104. Salk. 563. The recognizance is sent by the mayor, at the request of the conusor, into Chancery. See the stat. 13 Edw. I. st. 3.

(*z*) This writ issues out of Chancery, but is made returnable in the K. B. or C. B. by the provisions of the stat. 13 Edw. I. st. 3; but by the stat. 5 Hen. IV. c. 12, after a writ once awarded and returned into the Common Pleas, the Justice may award process without any further showing of the recognizance.

extent, and the intention of the *liberate* is to give him actual possession; and by the return of *liberari feci* the conusee is estopped from saying that he has not had possession (a).

* If the action be not against the conusor, but against one who had possession previous to the acknowledgment, the plaintiff must also prove the conusor's title, or if he claim under the conusor that his interest is determined (b), and the identity of the parties. * 518

The conusee of a statute-staple (c), or of a recognizance in the nature of a statute-staple (d), must prove the recognizance either by its production under the proper seals, or, as it seems, by an examined copy of its certification into the Court of Chancery (e) by the clerk of recognizances, and by examined copies of the writ of *capias* and return, and also of extent and *liberate*. A copy of the record, containing the recital of the award of these writs, and of their returns, seems to be sufficient evidence to prove them (f). Conusee of statute-staple

In case of the loss of a recognizance taken under the stat. 23 H. VIII. c. 6, it is provided by the stat. 8 Geo. I. c. 25, s. 2, that in order to enable the conusee to have process, a transcript from the roll shall be certified * by the clerk of recognizances into Chancery, in the same way as recognizances were directed by the former act to be certified in the same manner as if the recognizance had not been lost. The same section also directs that in case of such loss or damage, a copy from the roll, under the hand of the clerk or his deputy, when duly proved, shall be as * 519

(a) Per Holt, C. J. *Hammond v. Wood*, 2 Salk. 563. The statute 23 Hen. VIII. c. 6, and 27 Eliz. c. 6, s. 7 & 8, require a copy of every statute-merchant and staple to be delivered to the Clerk of Recognizances within four months after acknowledgment, or it will be void against subsequent purchasers. The latter stat. s. 9, requires the clerk to make the enrolment within six months after the acknowledgment, indorsing the day and year of entry on the statute, and by the stat. 29 Car. II. c. 3, the day and year of the enrolment of recognizances is to be set down in the margin of the roll, and no recognizances shall bind a *bona fide* purchaser of lands for a valuable consideration but from that time.

(b) *Doe v. Wharton*, 8 T. R. 2.

(c) See the stat. 27 Ed. III. s. 2, c. 9.

(d) See the provisions of the stat. 23 Hen. VIII. c. 6.

(e) By the provisions of the several acts referred to, upon the request of the conusee the recognizance is to be certified into the Court of Chancery; and it seems that the recognizance itself should be sent into Chancery, properly certified by the Clerk of Recognizances. See the stat. 23 Hen. VIII. c. 6, s. 5, and 8 Geo. I. c. 25, s. 2; which provide for the certifying in case of the loss of the original recognizance.

(f) See 2 M. & S. 565; & *infra*, tit. *Elegit*.

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IV.

Conusee of
statute-staple.
Devisee.
Freehold.

good evidence of the recognizance as if it had been produced under seal. Evidence of identity is also necessary, and if the proceedings be not against the conusor, the plaintiff must also give evidence of his title (*g*).

3. The *devisee* of a freehold interest must prove, 1st. The seisin of the devisor; and 2dly, the execution of the will; 3dly, the death of the devisor. He need not prove his own possession, since the law casts the seisin on the devisee; and although the heir enter before him his entry is not barred (*h*).

1st. Seisin of the devisor. Proof of his possession is *prima facie* evidence of a seisin in fee (*i*).

2dly. The execution of the will, see tit. *Will*.

3dly. The death of the devisor, see tit. *Death—Pedigree*.

Copyhold.

Proof of title, as devisee of a copyhold, has already been considered (*k*).

Leasehold.

The devisee of a leasehold must prove, 1st, the lease to the devisor; 2dly, the will by the probate (*l*); and 3rdly, Assent of the executor (*m*).

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Devisee,

1st. An admission by the defendant of the testator's *interest will supersede the necessity of proving the lease (*e*).

2dly. The will must be proved in order to show the devise of the real chattel, and this must be done by means of the probate, the only evidence of such a title to personal property recognized by Courts of Law (*n*).

3dly. Inasmuch as the legal title to the personal estate vests in the executor, even where it has been specifically bequeathed by the will, and does not vest in the legatee until the executor has assented to it, proof of such assent must be given. It is sufficient to prove that it was given either before or after probate (*o*). The legal interest vests in the legatee irrevocably by the executor's assent (*p*). No particular form of assent is necessary,

(*g*) *Vide antea*, 518.

(*h*) Co. Litt. 240; & *vide supra*, p. 514.

(*i*) See tit. *Heir*.

(*k*) See tit. *Copyhold*.

(*l*) *Antea*, Vol. I. p. 247, and tit. *Executor*; and see *Stone v. Forsyth*, Doug. 707.

(*m*) 1 Inst. 111, a. *Young v. Holmes*, 1 Stra. 70.

(*e*) *Digby v. Steel*, 3 Camp. 115.

(*n*) See Doug. 707.

(*o*) *Doe v. Guy*, 3 East, 120. 123.

(*p*) 4 Co. 28. *Paramour v. Yardley*, Plowd. 539. *Young v. Holmes*, 1 Str. 70. And per Ld. Ellenborough, *Doe v. Guy*, 3 East,

A general consent is sufficient (*q*). So is a letter, by which the defendant promises to give possession at a particular time (*r*). It seems that an assent is not to be *implied* from the sufficiency of assets (*s*); but an express assent will vest a term in the legatee from the death of the testator (*t*).

4. The tenant by *elegit* should produce an examined copy of the judgment-roll, reciting the judgment, the award of the *elegit*, and the return (*u*). It has indeed been formerly held, that an examined copy of the *elegit* itself, or of the inquisition and return, ought to be * proved (*x*), but * 521 this seems to be unnecessary, since the judgment-roll is incontrovertible evidence of every matter which it recites (*y*). It must appear from the return that the sheriff has set out a moiety by metes and bounds, or the return will be bad (*z*); the objection may be taken on the trial (*a*). If more than a moiety appear to have been extended, the plaintiff cannot recover (*b*); but the sheriff is not bound to set out one half of each particular tenement (*c*). If another than the debtor be in possession of the lands, the plaintiff must

Tenant by
elegit.

123. In case of a deficiency of assets, a court of equity would interfere, and cause the legatee to refund a proportional part.

(*q*) See *Duppa v. Mayo*, 1 Saund. 278; and the observation of Lawrence, J. 3 East, 124.

(*r*) *Doe v. Guy*, 3 East, 120.

(*s*) *Deeks v. Strutt*, 5 T. R. 690; and per Lawrence, J. 3 East, 124.

(*t*) *Saunders's case*, 5 Co. 12, b. 3 East, 125.

(*u*) *Ramsbottom v. Buckhurst*, 2 M. & S. 565. In ejectment under a sale by the sheriff under a *fi. fa.*, it is unnecessary to prove the judgment, as in the case of an *elegit* or outlawry. *Devon Lent Ass.* 1811, Cor. Power, J. Vin. Ab. Evidence, T. b. 104. *Secus*, where the lessor sued out the execution. Post, 1357, note (*t*). As to proof of the assignment, *vide ibid*.

Where a tenant has come into possession by lease, after the judgment, but before the issuing of the writ of *elegit*, notice to quit is unnecessary. *Doe v. Hilder*, 2 B. & A. 782.

(*x*) 2 Salk. 563. 1 Ld. Raym. 718. B. N. P. 104. Gilb. Ev. 9. 2 Will. Saund. 69, c. Trials per P. 386, 5th edit. Tidd's Pract. 1013, 5th edit. Runn. Eject. 330.

(*y*) 2 M. & S. 565.

(*z*) *Fenny v. Durrant*, 1 B. & A. 40. *Pullen v. Birkbeck*, Carth. 453. Hutton, 16. [See Dalison, 26. pl. 2—and old precedents, *contra*.]

(*a*) *Fenny v. Durrant*, 1 B. & A. 40.

(*b*) *Pullen v. Purbeck*, 2 Salk. 563. *Den v. Ld. Abingdon*, Doug. 472. B. N. P. 104.

(*c*) Doug. 472. 2 Salk. 563. 1 Sid. 91. 239. Cro. Car. 319.

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prove, in addition, the title of the debtor himself to the lands. As an ejectment will not lie unless the lessor has a right of entry, it seems that the tenant may take possession without an ejectment (*d*).
By a guardian.

5. A guardian in socage has an interest in the lands of the infant until the latter attain to the age of fourteen years, which will enable him to maintain an action of ejectment to recover them (*e*). To make out his title he must prove, 1st. That the infant is the heir to socage lands, which is to be proved, as in the case of title by an heir, by evidence of the seisin of the ancestor, of his death, and of the pedigree (*f*). 2dly. His own character as guardian, that is, that he is next of blood to the heir, * to whom the inheritance cannot descend (*g*), and by evidence that the infant was under the age of fourteen at the time of the demise, for from that time the title of the guardian ceases (*h*). A guardian who has been appointed by deed or will by virtue of the stat. 12 C. II. c. 24, s. 8, 9, must prove his appointment, either by the deed of the father, or his last will and testament, executed as the statute directs, in the presence of two or more credible witnesses, the title of the infant, and his minority at the time of the demise.

By heir at law. 6. The title of the heir at law consists in proof of, 1st. The seisin of the ancestor, &c. 2dly. In proof that he is heir to that person (*i*).

1st. Seisin. Actual possession, or receipt of rent from a tenant of the premises, is *prima facie* evidence of a seisin in fee (*k*). It is not necessary to prove an actual entry by

(*d*) See the opinion of Gibbs, C. J. *Rogers v. Pitcher*, 6 Taunt. 207. [1 Marsh. 541. S. C.] 3 T. R. 295. 2 Tidd's Pr. 1075. Eq. Ca. Ab. 381.

(*e*) Litt. sec. 123. Co. Litt. 88, 89. Bro. tit. *Guarden*, 70. Bac. Ab. tit. *Guardian*, 6. 2 Roll. Ab. 41.

(*f*) See Title by Heir.

(*g*) See 1 P. Wms. 703. Bac. Ab. *Guardian*, A. 9 Mod. 142. Hargr. Co. Litt. 87, b. n. 6.

(*h*) Bac. Ab. *Guardian*, E. Hardr. 69. *Doe v. Bell*, 5 T. R. 471. [*Byrne v. Van Hoesen*, 5 Johns. 66.]

(*i*) For proof of title as heir at law to a copyhold, or by virtue of a custom, see tit. *Copyhold*.

(*k*) B. N. P. 103. That which must be pleaded in a real action must be proved in ejectment, in order to make out a title by descent. *Shaw v. Lord*, 2 Bl. Rep. 1099. Proof of the possession of lands, and pertainancy of rents, is *prima facie* evidence of a seisin in fee. *Jayne v. Price*, 5 Taunt. 326. But proof of forty years subsequent possession by a daughter, whilst the son and heir lived near, and knew the fact, was held to be much stronger evidence that the father had but a particular estate.

the relation from whom the claimant derives his title. If a father die, leaving his estate let on a lease for years, the possession of the tenant will be a possession by his eldest son, so as to constitute a *possessio fratris* to the exclusion of the brother of the half blood (*l*). If on the other hand the estate on the death of the father was let on a freehold lease, there would be no *possessio fratris* unless the elder son lived to receive rent after the expiration of the lease (*m*). Where the father died, leaving two daughters by different mothers, and the mother of the youngest daughter entered generally as *guardian in socage of her youngest daughter, it was held that this constituted a sufficient seisin of the eldest daughter to carry the descent of her moiety to her heirs (*n*). * 523

2ndly. That he is heir. The requisite proofs to establish this fact are considered under the title *Pedigree*.—If the defendant rely on a devise of the lands to him, and give *prima facie* evidence of the due execution of the will, it is incumbent on the plaintiff either to disprove the execution of the will according to the statute, or to prove the want of assent of the supposed devisor to make a will, by proof of the practice of some fraud, or of his inability, or to dispute the operation of the will (*o*), or lastly to prove its revocation. These proofs are considered under the title *Will*. If the action be brought by the heir at law against a devisee under the will, the plaintiff will, in the usual course, be entitled to begin, and in the general reply, but if the devisee admit the plaintiff's *prima facie* case as heir, and rely solely on the devise, he will be entitled to the opening and reply (*p*). Proof of heirship.

7. If the ejectment be brought upon the determination of a lease, the plaintiff must prove, 1st. The demise. 2dly. Its determination. By landlord.

If the demise has been by deed or other written instrument it should be produced, and proved in the usual way, and if it be in the defendant's possession, notice must be given to produce it (*q*). After notice to produce the original, which is not produced, the plaintiff may give a coun- Proof of the demise.

(*l*) Co. Litt. 15, a. Jenk. 242. *Doe v. Keen*, 7 T. R. 390.

(*m*) Ibid.

(*n*) *Doe v. Keen*, 7 T. 386.

(*o*) In order to disinherit the heir, there must either be express words or a necessary implication. 3 Wils. 415. Doug. 763. Cowp. 31. 302. 661.

(*p*) *Vide, supra*, Part III.

(*q*) *Supra*, Vol. I. p. 357.

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Proof of the
demise.

terpart in evidence, or, if there * be none, a copy (r). If there has been no written demise, the plaintiff may prove a demise by parol; proof of payment of rent by the defendant is *prima facie* evidence of a tenancy from year to year (s). It is usual for this purpose to give notice to the tenant to produce the receipts, but the fact of payment may be proved by other evidence.

Evidence of the payment of an entire rent to the trustees of a charity, is evidence to support a joint demise, and it is not sufficient for the defendant to show that they were appointed at different times, in order to prove them to be tenants in common; in such a case express proof is requisite (t).

Determination
of the lease.

2dly. The determination of the lease. This may be proved, 1st, by the terms of the lease itself, where the term is certain; 2dly, by proof of notice where it is necessary; 3dly, by proof of some act of forfeiture.

1st. Where by the terms of the original lease the tenancy is to end on a precise day, no notice to quit is necessary, for both parties are apprized of the determination of the term (u).

Notice to quit.

2dly, If the tenancy be from year to year, the plaintiff must prove that the defendant has had the usual *notice to quit* six months previous to the time of the year when the defendant entered (1).

Time of entry.

A receipt for rent due at a particular day is *prima facie* evidence of a holding from that day (x). And where the tenant continues to hold the premises after the expiration of a lease, and assigns his interest, the assignee holds * from the day on which the tenancy under the lease commenced (y). It was once held that the notice to quit was in itself *prima facie* evidence that the tenancy commenced at the day specified in the notice for quitting (z). But on subsequent consideration of the point by the Judges, it was thought that this rule was not suffi-

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(r) *Burleigh v. Stubbs*, 5 T. R. 465. 7 East, 363. It seems that a counterpart is evidence in the first instance. *Roe v. Davis*, 7 East, 363.

(s) *Doe v. Samuel*, 5 Esp. 173.

(t) *Doe v. Grant*, 12 East, 221.

(u) Per Ld. Mansfield, *Right v. Darby*, 1 T. R. 162. *Messenger v. Armstrong*, 1 T. R. 54. *Cobb v. Stokes*, 8 East, 358.

(x) *Doe v. Samuel*, 5 Esp. 173.

(y) *Doe v. Samuel*, 5 Esp. 173.

(z) *Doe v. Harris*, cited 1 T. R. 161.

(1) [See, on the subject of notice, Mr. Day's note to the case of *Denn v. Rawlins*, 10 East, 263.]

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ciently supported by any principle. And it is now held, that the notice is not evidence of the time of entry, unless it be unobjected to at the time of service upon the defendant (*a*). Hence the notice is not evidence for this purpose unless it be served personally (*b*); nor then, unless the party can and does read it (*c*). And whether the defendant did or did not assent is a question for the Jury. Where the defendant at the time of service gave an angry answer, complaining that he had been harshly treated, it was held that he was not thereby precluded from showing that the notice had been served too late (*d*). But where the tenant, on application by the lessor's attorney, as to the commencement of his tenancy, misinformed him, and notice was given in conformity with his answer, it was held that he was concluded by it, and that it made no difference whether the information so given resulted from accident or design, since he had induced the party to act upon it (*e*).

Proof of notice.
Time of entry.

In general it must be proved that the notice to quit was served half a year before the expiration of the current year (*f*). A longer notice may be necessary, or a * shorter one sufficient, if a custom to that effect be proved (*g*). There is no distinction between houses and lands as to the time of notice (*h*). Where a tenant enters upon different portions of the premises at different times, for the convenience of husbandry, and it does not appear from any express agreement from what point of time the tenancy was to commence, the rule of law is, that it shall be

Six months
notice.

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(*a*) *Thomas v. Thomas*, 2 Camp. 647. *Doe v. Woombsell*, 2 Camp. 559. *Doe v. Forster*, 13 East, 405. *Doe v. Calvert*, 2 Camp. 388.

(*b*) *Doe v. Calvert*, 2 Camp. 388.

(*c*) *Thomas v. Thomas*, 2 Camp. 647. By the Court of K. B.

(*d*) *Oakapple v. Copous*, 4 T. R. 361.

(*e*) *Doe v. Lambly*, 2 Esp. C. 635.

(*f*) *Right v. Darby*, 1 T. R. 159. If a house be taken by the month, a month's notice is sufficient. *Doe v. Hazell*, 1 Esp. C. 94. A weekly reservation of rent is evidence of a weekly holding. *Doe v. Peacock v. Raffan*, 6 Esp. C. 4. But a quarterly reservation of rent does not dispense with a half year's notice. *Shirley v. Newman*, 1 Esp. C. 266. Where the entry was in the middle of a quarter, and payment was made for the fraction between the time of entry and Christmas, and the rent was afterwards paid at Christmas and Midsummer, it was held to be a holding from Christmas. *Doe v. Johnson*, 6 Esp. C. 10.

(*g*) *Roe v. Wilkinson*, Co. Litt. by Butler, 270, b. *Roe v. Charnock*, Peake's Cas. 5.

(*h*) 1 T. R. 162.

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Notice to quit.
Time of entry.

taken to commence from the time of entering upon that which is the principal and substantial subject of the demise (i); and it is a question of fact for the Jury to ascertain what is the principal, and what the accessorial subject of demise (k).

In the case of *Doe v. Snowden* (l), the arable part of the farm was held from Candlemas, but the rent was made payable from Old Lady Day, and the tenancy was held to commence on the latter day (m). Where the tenant was to enter upon the arable lands at Candlemas, and all the other premises on the Lady-day following, and agreed to quit the same according to the terms of entry as aforesaid, and the rent was reserved half yearly, at Michaelmas and Lady Day, the tenancy was held to commence from Lady Day, with a * privilege for the in-coming tenant to enter on the arable land at Candlemas, for the purpose of ploughing (n). Under an agreement of demise of a dwelling-house, mills, and other buildings, for the purpose of carrying on a manufactory, together with meadow, pasture, and bleaching-grounds; to commence, as to the meadow, from the 25th of December last, and as to the pasture, from the 25th of March next; and as to the housing, mills, and all the rest of the premises, from the first of May, reserving the first year's rent on the day of Pentecost, and the other half year's rent at Martinmas, it was held, that the substantial subject of the demise being the house and buildings for the manufacture, which were to be entered upon the first of May, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the in-coming tenant had liberty of entering on the meadow, which was merely ancillary to the other and principal subject of the demise, and therefore, that a notice to quit, served on the

(i) *Doe v. Spence*, 6 East, 120. *Doe v. Lea*, 11 East, 312. *Doe v. Howard*, 11 East, 498. See Co. Litt. 68. Aleyn, 4. 2 Ld. Raym. 1008. T. Jones, 5. 2 Salk. 413, 4. 3 Burr. 1603.

(k) *Doe v. Howard*, 11 East, 498.

(l) 2 Bl. Rep. 1224, cited 2 East, 383.

(m) Ibid. This case is said to have been overruled by Ld. Kenyon at *Nisi Prius*, in the case of *Doe ex dem. Ld. Grey de Wilton*, where the defendant entered upon the arable lands at Candlemas, and the buildings and pastures from May-day, the rent payable at Michaelmas and Lady-day, and the notice to quit was given six months before May-day, but not six months before Candlemas; and Ld. Kenyon nonsuited the plaintiff. But it does not appear in that case whether six months notice previous to Lady-day had been given. See the observations of Grose, J. 2 East, 383.

(n) *Doe v. Spence*, 6 East, 120.

28th of September, was sufficient (o). Where the time of entry depends on the terms of a deed or other written instrument, no parol evidence can be admitted to vary the terms. Where the demise was of lands to be held from the Feast of St. Michael, which must be taken to mean from New Michaelmas, it was held that evidence could not be admitted to show that Old Michaelmas was meant (p). Under an agreement between the landlord and tenant that the other party may determine the tenancy by giving a quarter's notice, such notice must expire on or before the day of the year on which the tenancy commenced (q).

Proof of notice.
Time of entry.

* The service of notice in writing is usually proved by the agent who served it, who produces a duplicate original, signed by the landlord; if there be no duplicate it seems that notice should be given to produce the original notice (r). It is not, however essential that the notice should have been in writing (s), although served on the behalf of a corporation aggregate (t); it is sufficient in such case to prove that the notice was given by the steward of a corporation aggregate, without showing that he had a power of attorney for the purpose, the adoption of the notice, by the bringing the action being sufficient proof of his authority (u); and it seems that an agent who has authority to let lands and receive rents has also authority to give a sufficient notice to quit (x); as in the instance of a receiver appointed by the Court of Chancery. * 528

Where a lease contained a proviso for its determination by either landlord or tenant, their respective heirs and executors, on giving six months notice under his or their respective hands, a notice signed by two of the landlord's executors, on behalf of themselves and a third executor, was held to be insufficient, for the proviso required the signature of all three, and the notice was not sustainable on the general rule of law, that one joint tenant

(o) *Doe v. Watkins*, 7 East, 551.

(p) *Doe v. Lee*, 11 East, 312. *Secus*, it is said, where the letting is by parol. *Doe v. Benson*, 4 B. & A. 588. *Supra*, 455.

(q) *Doe v. Donovan*, 2 Camp. 78. 1 Taunt. 555. S. C.

(r) But see *Ackland v. Pearce*, 2 Camp. 601; *Bills of Exchange*, *supra*, 132; *Grove v. Ware*, 2 Starkie's C. 174; and *tit. Attorney*, *supra*, 132.

(s) *Doe v. Crick*, 5 Esp. C. 196.

(t) *Roe on the dem. of the Dean & Chapter of Rochester v. Pierce*, 2 Camp. 96.

(u) *Ibid.* 2 Camp. 96, Cor. Macdonald, C. B.

(x) *Doe v. Read*, 12 East, 57. And see 5 Burr. 2604. *Doe v. Wood*, and *Doe v. Blair*, MSS.

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to quit.

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may bind the rest by an act done for their benefit, since there was no evidence that the determination of the tenancy was for the benefit of all (y). * And it was held, that the subsequent assent by the third executor did not make the notice good by relation, since the general principle did not apply to cases where the intermediate conduct of the parties would be affected by the ratification (z). If four joint tenants jointly demise the land from year to year, such as give notice to quit may recover their several shares in ejectment upon their several demises (a). Where a lessee underlet a part, and gave up the remainder to the lessor, it was held that the latter could not determine the sub-lessee's tenancy, by notice, since there was no privity between them (b). Proof of service on a servant at the dwelling-house of the tenant, although not upon the demised premises, is sufficient to warrant the presumption that the notice was received by the tenant. But after the death of the tenant, in an action against the widow, proof of leaving the notice at the dwelling-house, without any proof of delivery to a servant, or that the defendant lived there, was held to be insufficient (c). Upon a joint demise to two, one of whom resides on the premises, service upon him is sufficient to enable the Jury to presume that it reached the other (e). If the notice has been signed by an attesting witness, he must be called to prove it (f); and it * is not sufficient in such a case to show that upon service of the notice the tenant read it over, and did not object to it (g).

It must appear on the face of the notice thus proved, that the tenant was sufficiently apprized by it of the landlord's intention to determine the tenancy at the expiration

(y) *Right v. Cuthell*, 5 East, 491.

(z) *Ibid.*

(a) *Doe d. Wayman v. Chaplin*, 3 Taunt. 120. The several demises to the plaintiff in ejectment sever the joint-tenancy. Per Lord Ellenborough, *Doe v. Read*, 12 East, 57.

(b) *Pleasant v. Benson*, 14 East, 234. If the lessee, on receiving notice to quit, gives notice to his sub-lessees to quit, and they refuse, ejectment may be maintained against him for so much as his sub-lessees refuse to give up. *Roe v. Wiggs*, 2 N. R. 330.

(c) *Jones v. March*, 4 T. R. 464; *Runn*. 112; 4 T. R. 361.

(d) *Doe v. Lucas*, 5 Esp. C. 153.

(e) *Doe v. Watkins*, 7 East, 551. So a parol notice to one has been deemed to be sufficient. 5 Esp. C. 196, *Doe v. Crick*. Co. Litt. 49, b.

(f) 2 M. & S. 62.

(g) *Doe v. Durnford*, 2 M. & S. 62.

of the current year. A notice to quit at Lady-day generally is a sufficient notice for Old Lady-day (h). Notice to quit on the 25th of March, or 8th of April, is sufficient, if it be delivered six months before the former day, although it be doubtful which of these was the day of entry (i). Where a lease was by parol from Lady-day, and notice was given to quit at Old Lady-day, it was held that parol evidence was admissible of the custom of the country to show that by Lady-day the parties meant Old Lady-day (k).

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Proof of notice
to quit.

A mis-description of the premises in the notice will not be fatal unless the party be misled by it. Where by mistake the Waterman's Arms was inserted for the Bricklayer's Arms, the variance was held to be unimportant (l). The plaintiff, instead of proving the notice to quit may show that the tenant has denied his (the landlord's) title (m), and holds adversely; but if it appear that the tenant has refused to quit on account of a dispute between contending claimants, notice will still be necessary (n).

* In the case of a tenancy at will, the plaintiff must prove an entry upon the premises, or a notice to quit, or demand of possession, or some other act done by him to determine the tenancy, previous to the day of the demise in the declaration. The confession of the defendant by entering into the common rule, is not evidence to show such determination (r). One put into possession upon an agreement for the purchase of land, cannot be ousted of the possession before the lawful possession has been determined, by a demand, or otherwise (s). And so it is where a tenancy at will is created by means of a lease for four years, without writing (t).

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Tenant at will.

In ejectment for a forfeiture by the tenant or his assignee, Forfeiture.

(h) *Dunn v. Walker*, Peake's Ev. 367. *Dunn v. Wane*, Ibid. *Doe v. Vince*, 2 Camp. 256. *Doe v. Brookes*, 2 Camp. 257, n. See *Furley v. Wood*, 1 Esp. C. 198. *Doe v. Lea*, 11 East, 312.

(i) *Doe v. Wrightman*, 4 Esp. 5.

(k) *Doe d. Hall v. Benson*, 4 B. & A. 588. *Secus*, where the letting is by deed. *Doe v. Lea*, 11 East, 312. And see *Furley v. Wood*, 1 Esp. C. 198; *supra*, tit. *Custom*.

(l) 4 Esp. C. 185.

(m) B. N. P. 96; Cowp. 622.

(n) *Doe v. Pasquali*, Peake's C. 196.

(r) *Right v. Beard*, 13 East, 210.

(s) Ibid. [9 Johns. 330. 10 Johns. 335.]

(t) *Goodtitle v. Herbert*, 4 T. R. 680.

PART.
IV.

Forfeiture.
Non-payment
of rent.

the plaintiff must first prove the lease, and 2dly, the breach of it (u).

In ejectment against the assignee on a clause of re-entry for non-payment of rent, it has been held to be sufficient to prove the execution of a counter-part, without proving the original lease, or notice to produce it (x).

2dly. Determination by forfeiture. Where the landlord is entitled to re-enter for a forfeiture it is unnecessary to prove an actual entry (y).

* 532 In ejectment, upon a condition for re-entry for non-payment of rent, the landlord must prove an actual demand of the rent, although no one be there * to pay it (z), of the precise rent (a), on the precise day (b); upon the demised land, at the most notorious place upon it; at a convenient time before sunset (c), by the landlord, or by a person duly authorized by him to demand it by a power of attorney (d), which he produced at the time, or which he had ready to produce, having notified it to the tenant (e).

By the stat. 4 Geo. II. c. 28, which was made to relieve the landlord from the difficulties under which he laboured at common law, the landlord may, when one half year's rent is in arrear, and no sufficient distress is to be found, and he has a right to re-enter for non-payment, serve a declaration in ejectment, or in case it cannot be legally served may affix it to the door of the demised messuage, or upon some notorious place on the lands comprised in the declaration, which service, or affixing of declaration, shall stand instead of a demand and re-entry. Under this statute, the plaintiff, after proof of the lease, and of service of declaration, or that it was affixed as the statute directs, must prove that there was no sufficient distress upon the premises.

(u) The defendant, on motion, is entitled to a particular of the breaches. *Doe v. Philips*, 6 T. R. 597.

(x) *Roe v. Davis*, 7 East, 363; and see *Nash v. Turner*, 1 Esp. C. 217.

(y) It has been so held since the time of Ld. Holt. 1 Saund. 287, n. 16.

(z) Plow. 70, *Kidwelly v. Brand*. 1 Roll. Ab. 458. Proof that the lessor went upon the land, and said to an under tenant, I am come to demand of you such a sum for my rent, is sufficient; *Doe v. Brydges*, 2 D. & R. 29.

(a) 1 Leon. 305. Cro. Eliz. 209, *Fabian v. Winston*. [Sav. 121. S. C.]

(b) See the cases, 1 Will. Saund. 287, n. 16.

(c) Ibid. and 7 T. R. 117. 7 East, 363. Cro. Eliz. 209. Harg. C. Litt. 202. [See *Jackson v. Harrison*, 17 Johns. 66.]

(d) Co. Litt. 201. 1 Roll. Ab. 458.

(e) 7 East, 363, *Roe v. Davis*.

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IV.

Where the rent was due on Lady-day, and the declaration served on the 6th of June, and by the lease the lessor was empowered to re-enter in fourteen days after the time for payment, evidence that the plaintiff's broker went upon the premises in *May* and found nothing to distrain upon, was held to be presumptive * evidence that there was no sufficient distress on the 2d of May, the day of demise (*f*).

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By the provisions of a late stat. (*g*), if it shall appear that the tenant has been served with due notice of trial, the landlord may on the production of the consent-rule, and proof of his title to the whole or part of the premises mentioned in the declaration, give evidence of and recover the mesne profits. Damages.

It is a general rule, that a tenant shall not be permitted to dispute his landlord's title (*h*), nor a mortgagor to impeach his own title at the time of the mortgage (*i*). Nevertheless it is competent to a tenant to show that the landlord's title, has expired (*k*) subsequently to the demise. And as the tenant cannot deny the landlord's title, neither can any one controvert it who claims by him. A third person cannot defend as landlord where the tenant came into the possession under an agreement with the lessor of the plaintiff (which has expired,) and paid rent to him but afterwards disclaimed (*l*).

Evidence for the defendant. Tenant cannot controvert his landlord's title.

The defendant may prove in answer, a tender at any

(*f*) *Doe v. Fuchau*, 15 East, 286. Where there is a clause for re-entry on non-payment of rent, if there be no sufficient distress on the premises proof must be given that every part of the premises was searched; per Heath J. Hereford Summer Ass. 1800; and afterwards by the Court of Exch. cited 2 B. & B. 514.

(*g*) 1 Geo. IV. c. 87, s. 2.

(*h*) The estoppel of a tenant exists during his occupation only; during that he is not permitted to deny his landlord's title, for he has a meritorious consideration; but if he be ousted by a title paramount, he may plead it (*Hayne v. Maltby*, 3 T. R. 438.) A tenant under a tenant for life cannot dispute the title of the reversioner, for they are the same title (*Doe v. Whitsor*, 2 D. & R. 1); neither can a tenant dispute the title of the lessee, the landlord having paid rent to him. *Rennie v. Robinson*, 1 Bing. 147.

(*i*) B. N. P. 110. *Lade v. Holford*, 3 Burr. 1416.

(*k*) *England v. Slade*, 4 T. R. 682. *Doe v. Ramsbotham*, 3 M. & S. 516. See *Doe d. Grundy v. Clarke*, 14 East, 488. A tenant cannot set up the title of the mortgagee against the mortgagor (per Buller, J. 1 T. R. 760, *n*.) A tenant cannot insist against the will of the landlord that his own act amounts to a forfeiture (*Doe v. Bancks*, 4 B. & A. 401). A landlord does not by waving his right on an under-letting, wave his right on any under-letting. *Doe v. Bliss*, 4 Taunt. 735.

(*l*) *Doe v. Lady Smythe*, 4 M. & S. 347.

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Evidence for
the defendant.
Tenant cannot
controvert his
landlord's title.

time on the last day for the payment of the * rent (*m*), or a waiver of the forfeiture by the receipt of rent subsequently due (*n*), provided the landlord had notice of the forfeiture; and reasonable evidence ought to be given that he had such notice (*o*); such receipt of subsequent rent will not set up a void lease for years (*p*). But as a lease for life cannot be avoided without entry, the acceptance of subsequent rent without entry will restore the lease (*q*).

So the defendant may show a waiver by the landlord of his notice to quit by the acceptance of subsequent rent; but it is a question of fact for the Jury, whether it was paid as rent, and received as such, or merely as a compensation for damage (*r*), or that the landlord has distrained (*s*) for subsequent rent.

A second notice to quit on a subsequent day is a waiver of the first notice (*t*).

Where a tenant for years levied a fine, and the reversioner granted the reversion without taking advantage of the forfeiture, it was held that ejectment could not be maintained on the demise either of the grantor or of the grantee (*u*).

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Waiver of forfeiture.

* It is in general a good defence to show that the lessor of the plaintiff has recognized a legal possession by the defendant as tenant, by the receipt of rent from him for a time subsequent to that on which the alleged title of the lessor of the plaintiff accrued.

(*m*) Co. Litt. 201, 202, a.

(*n*) *Goodright v. Davids*, Cowp. 803; 3 Co. 64; 2 T. R. 425; Co. Litt. 201. *Goodright v. Cordwent*, 6 T. R. 219.

(*o*) Cowp. 803. *Roe v. Harrison*, 2 T. R. 245.

(*p*) Co. Litt. 215; 1 Will. Saund. 287; 3 Co. 64; Willes, 176.

(*q*) 1 Will. Saund. 287; Co. Litt. 211, b.; Co. Litt. 215, a. 3 Co. 64.

(*r*) *Doe v. Batten*, Cowp. 243; 2 H. B. 312. *Goodright v. Cordwent*, 6 T. R. 219. *Goodright v. Davids*, Cowp. 803. *Sykes d. Murgatroyd v. —*, cited 1 T. R. 161. Note, that in the case of *Doe v. Batten* a receipt was given as *for rent*, in order to deceive the landlord. Per Wilson, J. 1 H. B. 312.

(*s*) *Zouch v. Willingale*, 1 H. B. 311. *Secus*, if he distrain for rent due before the expiration of the notice. *Ibid.* and *Brewer v. Eaton*, cited 6 T. R. 220.

(*t*) *Doe v. Palmer*, 16 East, 53. *Secus*, if under the circumstances the tenant could not understand the second notice as amounting to a waiver of the first (*Doe v. Humphreys*, 2 East, 237). Where a landlord gave notice to quit, and after the expiration of that notice gave notice to quit, or pay double rent, the second notice was held to be no waiver of the first, or of the double rent to which the plaintiff was entitled under it. *Messenger v. Armstrong*, 1 T. R. 53.

(*u*) *Fenn v. Smart*, 12 East, 444.

Where a tenant for life made a lease, which was void, and a subsequent tenant for life received rent from the lessee the defendant, it was held that this was such a recognition of a lawful possession by the defendant that ejectment could not be maintained against him without notice to quit (*r*). So he may prove, as has been seen, that a forfeiture has been waived, or a continuance of a tenancy admitted by the subsequent acceptance of rent (*s*). But where the rent is not received, as between landlord and tenant, but is attributable to another consideration, such receipt is not evidence of a recognition of a legal possession (*t*), and therefore the receipt of a nominal rent from one as *cestui que vie*, after the death of the tenant for life, is not sufficient to entitle the widow of the former to notice to quit (*u*).

Receipt of
rent.

9. The proof of the execution of the deeds (*x*) by the mortgagor, who is in possession of the premises, is usually conclusive against him, since he cannot set up a title inconsistent with his own deed (*y*). But if a third person be defendant, it is necessary to prove that the mortgagor was in possession by the receiving of rents, or otherwise, at the time of the mortgage (*z*). And where the defendant claims as tenant to the mortgagor under a lease prior to the mortgage, a regular determination of the tenancy by a notice to quit, * must be proved (*a*). But where the mortgagor has let the premises subsequently to the mortgage, no notice is necessary (*b*), although the mortgage was assigned to the lessor after the defendant had been let into possession (*c*), unless he has by some act acknowledged a tenancy, as by the receipt of rent (*d*). If the tenant has a legal title to the term the lessor of the plaintiff cannot recover, although his only object is to get into possession of the rents and profits (*e*).

By mortgagor,

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The lessor of the plaintiff need not prove any notice to

(*r*) *Denn v. Rawlins*, 10 East, 261. [& Mr. Day's note.] *Doe v. Watts*, 7 T. R. 83.

(*s*) *Supra*, 534

(*x*) See tit. *Deed*.

(*t*) 3 East, 260.

(*y*) *Peake's Ev.* 313.

(*u*) *Right v. Bawden*, 3 East, 260.

(*z*) *Ibid*.

(*a*) *Birch v. Wright*, 1 T. R. 378.

(*b*) *Keech v. Hall*, Doug. 21. 3 East, 449.

(*c*) *Thunder v. Belcher*, 3 East, 449.

(*d*) *Ibid.* and *Clayton v. Blakey*, 8 T. R. 3.

(*e*) *Doe v. Wharton*, 8 T. R. 2. *Aliter*, B. N. P. 96. Doug. 23.

PART copyhold lands laid between the times of the surrender and
IV. admittance, will be good, for the title relates from the
 admittance to the surrender as against all except the
 Variance from lord (x).
 the demise.

A demise laid by the heir on the day when his ancestor died, is good for the fiction that there is no fraction of a day, is not allowed to prejudice any party (y). So where the ejectment was brought by a posthumous son, and the
 * 539 demise was laid at the time * of the father's death (z). No variance between the extent of the lease laid in the declaration, and the extent of the interest of the lessor of the plaintiff, is material, for the lease is but a fiction (a).

If such a title be not proved as would enable the lessor of the plaintiff to make such a demise in point of law as is alleged in the declaration, the variance will be fatal (b), and therefore, if *A.* be tenant for life, with remainder to *B.*, a count upon a joint demise by *A.* and *B.* cannot be supported, for it is not the lease of *A.* and *B.* but the lease of *A.* confirmed by *B.* (c). So a count upon a joint lease by tenants in common is bad (d). There should, in such case, be a distinct count upon the separate demise of each tenant in common, or they should join in a lease to a third person, who may make a lease to try the title (e) (1).

(x) *Holdfast v. Clapham*, 1 T. R. 600. *Supra*, tit. Copyhold. The Court will not try a question of metes and bounds in an action of ejectment. *Doe v. Wilson*, 2 Starkie's C. 477.

(y) 3 Wils. 274.

(z) B. N. P. 105.

(a) *Doe v. Porter*, 3 T. R. 13. Runn. 94.

(b) For the word "demise," when used in pleading, is to be taken in its legal sense. 3 T. R. 15. 2 Bl. Rep. 1077. 5 Burr. 2604. 1 Wils. 1. Moor, 682. Cro. Jac. 83. 166. 1 Show. 342. 2 Wils. 232. 1 Brownl. 39, 40. 134. 2 Stra. 1180. But see p. 538; and below, note (d).

(c) 6 Co. 14, b. Woodfall's Land. & Ten. 461. Co. Litt. 45, a. Poph. 37.

(d) Cro. Jac. 166. 1 Inst. 200. 2 Wils. 232. 12 East, 221. But *qu.* whether, as a lease is admitted by the consent-rule, a lease may not be presumed in which each demised his undivided share. See *Doe v. Read*, 12 East, 57; and the observations of Gibbs, A. G. p. 61. [See 2 Phil. Ev. 170, 171. n.]

(e) 2 Wils. 232.

(1) [In New-York, tenants in common may declare either on a joint demise, or on separate demises. *Jackson v. Bradt*, 2 Caines' Rep. 169. A coparcener may bring ejectment on her separate demise. *Jackson v. Sample*, 1 Johns. Cas. 231. Where a declaration contains separate demises from several lessors, the plaintiff may give in evidence the separate titles of the lessors to separate

Where the demise was upon a joint lease by the husband and wife, and proof was given of a lease made by a third person, by virtue of a power of attorney, executed by both, it was held to be a variance, but it was also held that the power of attorney was void as to the wife only, and that the lessee might declare on *a lease by the husband alone (f). * 540
It seems that joint tenants may make several demises (g).

Where the lease is alleged in the declaration to be by deed under the corporation seal, it is unnecessary to prove the fact, since by the rule the lease is admitted as stated (h) (1). Variance from declaration.

Evidence of taking tithes only is not sufficient to prove an ouster from a rectory (i).

A variance in the fractional amount sought to be recovered will not preclude the plaintiff from recovering any smaller fraction; if the declaration be for one fourth of one fifth part, and he prove his title to one third part of a fourth of a fifth part, the verdict may be taken accordingly (k), but the verdict cannot be taken for more than is claimed (l). So the verdict may be for any quantity of

(f) Yelv. 1. [and note.] 2 Brownl. 248. Cro. Jac. 617. Cro. Car. 165, *contra*.

(g) *Doe v. Read*, 12 East, 57. [See *Milne v. Cummings*, 4 Yeates, 577.]

(h) Per Ashhurst, J. *Farley*, on d. *Mayor, &c. of Canterbury*, v. *Wood*, Runn. 150.

(i) Latch, 62. Runn. 136.

(k) 1 Sid. 239. 1 Burr. 330. [*Santee v. Keister*, 6 Binney, 36. *Squires v. Riggs*, 2 Hayw. 150. *Den v. Evans*, *ibid.* 222.]

(l) 1 Burr. 330. [*Davies v. Whitesides*, 1 Bibb, 510.]

parts of the premises, and recover accordingly. *Jackson v. Sidney*, 12 Johns. 185.

In North-Carolina, tenants in common may recover on a joint demise. *Doe v. Potts*, 1 Hawks, 469.

In Kentucky, tenants in common cannot make a joint demise. *Innis v. Crawford*, 4 Bibb, 241. On a joint demise, the title must be joint, or the plaintiff cannot recover. *Taylor v. Taylor*, 3 Marsh. 19. An ejectment cannot be maintained on a joint demise by husband and wife, when the title is in the husband alone. *Tucker v. Vance*, 2 Marsh. 458. But where the plaintiff declares on separate demises by two, and fails to prove title in one of the moieties, he may nevertheless recover, according to the title proved in the other lessor. *Allen v. Trimble*, 4 Bibb, 21. A declaration, stating that the lessors jointly and severally demised, is supported by proving a tenancy in common. *Courtney v. Shropshire*, 3 Littell's Rep. 266.]

(1) [In ejectment by a corporation, the court will presume the demise to have been under their corporate seal. *University v. Johnston*, 1 Hayw. 375, *note*.]

PART
IV.Defendant's
possession.

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land less than that specified in the declaration (*m*). Upon a demise of the whole, an undivided moiety may be recovered (*n*) (1).

V. The plaintiff must prove that the defendant was in possession of the premises in question at the time of bringing the action, for otherwise, if the plaintiff could * prove title to any premises answering the description in the declaration, he would be entitled to a verdict and his costs, although the defendant never intended to dispute his title to those premises, but only his title to others, which the plaintiff has failed to prove (*o*); but by a late rule of the Court of King's Bench, a party on being admitted to defend in ejectment, must, on entering into the common rule, specify the premises in respect of which he intends to defend, and admit that they are in his own possession, if he defends as tenant, or in the possession of his tenant, if he defends as landlord, and undertake to admit such possession on the trial of the cause (*p*).

(*m*) Cro. Eliz. 12, 13. Yelv. 114. It was formerly held, that upon a declaration for one acre, a verdict for half an acre would be bad, because it would be uncertain of which half the plaintiff was to have execution. The Court will not on the trial of an ejectment, where the plaintiff has proved his title to a verdict, inquire as to the metes and boundaries which are to be tried more properly in an action of trespass. 2 Starkie's C. 477, *Doe v. Wilson*.

(*n*) *Doe v. Wippel*, 1 Esp. C. 360. *Doe v. Fenn*, 3 Camp. 190. *Roe v. Lonsdale*, 12 East, 39.

(*o*) See *Doe v. Cuff*, 1 Camp. 173. *Smith v. Man*, B. N. P. 110; 1 Wils. 220. *Goodright v. Rich*, 7 T. R. 327. *Fenn v. Wood*, 1 B. & P. 573. 3 Camp. 517. But see *Jesse v. Bacchus*, Runn. 293.

(*p*) See the rule, 4 B. & A. 196. It is there recited that plaintiffs have frequently been nonsuited in ejectment for want of proof of the defendant's possession, contrary to the true intent and meaning of the consent-rule. It is therefore ordered, "That from henceforth, in every action of ejectment, the defendant shall specify in the consent-rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed."

(1) In Maryland & North-Carolina, where an entirety is demanded in ejectment, there cannot be a recovery of an undivided part—the nature of such recovery being considered different from that of the claim. *Carroll v. Norwood*, 1 Har. & J. 463, note. *Young v. Drew*, 1 Taylor, 119. *Secus*, in Kentucky. *Gist v. Robinet*, 3 Bibb, 2. *Ward v. Harrison*, *ibid.* 304. *Larue v. Slack*, 4 Bibb, 358.]

VI. Where two persons are contending for the possession, who are to pay rent in different rights, it seems that the landlord is not a competent witness to prove the priority of demise in an action of ejectment. As where *A.* the landlord demises to *B.*, and afterwards to *C.*, and the latter demises to *D.*, against whom *B.* brings ejectment, *A.* is not competent to prove the * demise to *B.*, for the effect * 542 would be to change the possession (*q*). But if in such case no rent be reserved (*r*), or if the question arose on an action of covenant brought by *C.* against *D.*, then *A.* would be competent to prove the priority of the demise to *B.*, for the result would not alter the possession, and the verdict would not be evidence afterwards, either for or against *A.* the landlord (*s*). PART
IV.
Competency.
Witnesses.

An executor in trust may be witness with respect to the estate, as to prove the sanity of the testator (*t*). So where a grantee is a bare trustee, he is competent to prove the execution of the deed to himself (*u*). A co-defendant is not a competent witness (*x*). Competency.

A tenant is not competent to defend his landlord's possession (*y*). Where *prima facie* evidence has been given against the defendant, a witness is incompetent to prove that he himself is the real tenant, and that the defendant is but his bailiff (*z*).

VII. *Trespass for mesne profits.*

Where trespass is brought against the tenant in possession, for mesne profits, whether by the lessor, or by the nominal plaintiff after a recovery in ejectment, the plaintiff need not prove a title; it is sufficient to prove the judgment in ejectment, and the writ of possession executed, the Proof in action for mesne profits.

(*q*) Per Buller, J. in *Bell v. Harwood*, 3 T. R. 308, and *Fox v. Swann*, Sty. 482; *Smith v. Chambers*, 4 Esp. C. 164.

(*r*) Per Buller, J. in *Bell v. Harwood*, 3 T. R. 308.

(*s*) *Bell v. Harwood*, 3 T. R. 808. See also *Rex v. Woodland*, 1 T. R. 261; and *Fox v. Swann*, Sty. 482.

(*t*) 1 Mod. 107; Doug. 139. 141; 4 Burr. 2254.

(*u*) 1 P. Will. 287. 290.

(*x*) *Dormer v. Fortescue*, Runn. 250; *Doe v. Green*, 4 Esp. C. 198.

(*y*) *Bourne v. Turner*, Str. 633; *Doe v. Williams*, Cowp. 621.

(*z*) *Doe v. Wilde*, 5 Taunt. 183; *S. P. Doe d. Lewis v. Bingham*, 4 B. & A. 672. A lessee no longer interested, having become a bankrupt, obtained his certificate, and released his surplus, is competent. *Longchamps v. Fawcett*, Peake's C. 71. [1 Mass. Rep. 91.]

A tenant in possession is incompetent as a witness for the defendant, to prove any thing connected with the title under which he holds. *Doe v. Pye*, 1 Esp. C. 364.

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IV.

Where the parties are different the judgment is not evidence of title (*l*).

EXAMINATION of *Witness*. See Vol. I. Part II. sec. xiii. xcvi. ; *supra*, tit. *Depositions* ; and *infra*, tit. *Witness*.

- * 546 * EXAMINATIONS in *Cases of Felony*. See Part IV. tit. *Admissions*.

EXAMINATIONS taken under judicial authority by virtue of different statutes, are in general (unless the statute specially enact the contrary) inadmissible, even after the deaths of the witnesses, for although they are taken judicially and upon oath, yet inasmuch as they are taken *ex parte*, the opportunity for cross-examination, which, it is to be remembered, is one of the two great tests of truth, is wanting (*o*). Hence the *ex parte* examination of a pauper, taken judicially (*u*) on oath before two magistrates (*x*), is not evidence in a settlement-case, for the appellants had no power to cross-examine. But in the case of *The King v. Ravenstone* (*y*) the Court held that the examination of a pregnant woman, under the stat. 6 Geo. II. c. 31, in the absence of the party upon whom she filiated the child, was evidence after her death, upon which the Court of Quarter Sessions might make an order of filiation. This decision is contrary to general principles ; and the cases of depositions before magistrates, under the statutes of Philip & Mary, in felony, upon which the Court are reported to have relied in the above case, are in direct opposition to it.

- * 547 Although the Mutiny Act (*z*) makes an *attested copy* of a soldier's affidavit evidence, the original is, by * reasonable intendment, also admissible (*a*), and either the original or

(*l*) Vol. I. p. 191.

(*o*) *Supra*, Vol. I. p. 96.

(*u*) By virtue of the stat. 13 & 14 Car. II. c. 12, s. 1, which in giving power to the magistrates to remove incidentally, gives a power to examine upon oath, per Ld. Kenyon, *Rex v. Eriswell*, 3 T. R. 721.

(*x*) *Rex v. Ferry Frystone*, 2 East, 54. *Rex v. Nuncham Courtenay*, 1 East, 373.

(*y*) 5 T. R. 373.

(*z*) 55 Geo. III. c. 180, s. 70.

(*a*) *Rex v. Warley*, 6 T. R. 534. Upon the same principle that the service of notice of distress on a party is good notice, although the stat. directs that it shall be left at his house ; see tit. *Distress* ; but see *Burdon v. Ricketts*, 2 Camp. 121. n.

the attested copy is admissible, although the soldier be dead, or be beyond the realm (*b*). But no other attested copy but that delivered to the soldier is admissible (*c*); and such attested copy does not upon production prove itself, but must be authenticated by evidence of the hand-writing of the magistrates (*d*).

PART
IV.

EXECUTORS AND ADMINISTRATORS.

I. *Evidence in actions by Executors and Administrators.*

1. *Proof of title when necessary.*
2. *Title, how proved.*
3. *Proof of the cause of action.*

II. *Evidence in actions against executors.*

1. *Under the plea of ne unques executor.*
2. *Plene administravit.*
3. *Outstanding bonds, and judgment recovered.*
4. *On nil debet—Non devastavit, &c. to debt on judgment—Scire fieri inquiry, &c.*

1. WHERE an executor or administrator brings an action in his representative capacity merely, as where he declares in trover on a possession by the testator (*e*) or intestate, and a conversion in his life-time (*f*), or upon a contract made by him, he makes * a profert of the probate, or of the let-
ters of administration, and if the defendant mean to dispute his right to sue in the representative character which he assumes, he must do so by his plea in abatement, and cannot make the objection by evidence under the plea of the general issue, or of any other plea in bar (*g*), for such a

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Proof of title,
where neces-
sary.

(*b*) *Rex v. Warminster*, 3 B. & A. 121. Contrary to the opinion expressed by Lawrence, J. *Rex v. Clayton le Moors*, 5 T. R. 708.

(*c*) *Rex v. Clayton le Moors*, 5 T. R. 704.

(*d*) *Rex v. Bilton*, 1 East, 13.

(*e*) *Blainfield v. March*, 7 Mod. 141.

(*f*) It has been said, that where the goods of the testator were never in possession of the executor, he must sue as executor (*Cock-erill v. Kynaston*, 4 T. R. 280); and that whether the conversion were before or after the death, if the goods when recovered will be assets, he may sue for them as executor. And Ld. Holt, C. J. in *Mearsfield v. Marsh*, 2 Ld. Raym. 824, held, that if an administrator declared in trover upon a possession by the testator, and a conversion after his death, the defendant could not, under the plea of the general issue, show that there was an executor. But see the cases cited below, p. 549, note (*n*).

(*g*) *Blainfield v. March*, 7 Mod. 141. Per Holt, C. J. *Mearsfield v. Marsh*, 2 Ld. Raym. 824. *Loyd v. Finlayson*, 2 Esp. C. 564. 1

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IV.

Proof of title,
when necessary.

plea puts in issue the cause of action merely, and not the character in which the plaintiff sues (*h*).

Thus, if an administrator declare on an *assumpsit* to the intestate, the defendant cannot, under the plea of *non assumpsit*, dispute the grant of administration to the plaintiff, and if the letters were to be produced, he could not object the want of a proper stamp (*i*). So the plea of *non est factum* on a bond to the intestate admits that the plaintiff is a good administrator (*k*). But if the plaintiff declare on a cause of action arising in his own time, he must, under the general issue, if it be essential to his claim, prove his title as executor or administrator, and the defendant may controvert it. * Thus, if he declare as administrator upon his own possession, the defendant may, under the general issue, impeach his title, and show that there is an executor (*l*); and even if the plaintiff declare in trover upon a possession by the testator, and a conversion in his own time, it seems that the case is just the same as if he had declared, as he might have done, upon his own possession (*m*), and that he must prove himself to be such under the plea of the general issue, which raises the question of title (*n*). Where the plaintiff has not had the actual possession of the testator's goods, proof of his executorship seems to be essential to the proof of property in the goods; but where he has taken

Will. Saund. 275, n. 3. 1 Salk. 285. Vin. Ab. Ev. P. b. 7, pl. 5. Peake's Ev. 373; and see *Eldon v. Keddell*, 8 East, 187. *Newman v. Leach*, Barnes, 365. [*Berry v. Pullam*, 1 Hayw. 16.]

(*h*) Per Holt, C. J. *Mearsfield v. Marsh*, 2 Ld. Raym. 824.

(*i*) *Thynne v. Protheroe*, 2 M. & S. 553. *Watson v. King*, 4 Camp. 272. Com. Dig. *Abatement*, E. 13. In *Hunt v. Stevens*, 3 Taunt. 113, the conversion was alleged to be in the time of the executor.

(*k*) *Gidley v. Williams*, 1 Salk. 38, 3d. Resol. Com. Dig. *Pleader*, 2 D. 10. 2 D. 14.

(*l*) Per Holt, C. J. *Mearsfield v. Marsh*, 2 Ld. Raym. 824.

(*m*) For the property in goods draws to it the possession in law. *Jenkins v. Plumber*, 6 Mod. 182. 2 Will. Saund. 47, *k*. and the cases there cited.

(*n*) *Hunt v. Stevens*, 3 Taunt. 113; and see the observations of Lawrence, J. *ibid.* 10 East, 293; *Grimstead v. Shirley*, 2 Taunt. 116; and see *Bollard v. Spencer*, 7 T. R. 358, and the cases cited there; and 2 Will. Saund. 47, *k*. to show that where the conversion was in the time of the executor, he is liable to costs. *Contra*, *Cockcrill v. Kynaston*, 4 T. R. 280. So if an executor declare on an account stated with him as executor, without saying concerning money due from the defendant to the testator. *Jones v. Jones*, 1 Bing. 240. See *Hollis v. Smith*, 2 Taunt. 119.

actual possession, evidence of this nature, as against a wrong-doer, is unnecessary, for bare possession is *prima facie* evidence of property (*o*). Where the money of the testator is received by the defendant, after the death of the testator, the executor may maintain an action in his own name (*p*).

2. The title of the executor is established, as has already been seen, by proof of the death of the testator, and by the production of the probate, which is the only mode of proving the title to personal property under a *will (*q*), but the right of the executor is derived from the will, and accrues immediately upon the death of the testator; the probate is but the evidence of his title (*r*), consequently the grant of a probate subsequently to the commencement of the action, but previous to the declaration, will be sufficient (*s*). Proof of title.
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If the probate has been lost, an exemplification under the seal of the Court, or an examined copy of the act-book (*t*), or the original will, properly authenticated, and indorsed as the instrument on which probate has been granted, will be admissible to prove it (*u*).

The defendant, on the other hand, may prove, on issue joined on a plea in abatement denying the plaintiff's title as executor or administrator, either that the grant was void *ab initio*, as by evidence that the probate was forged; or that the intestate had *bona notabilia* in another diocese (*x*);

(*o*) *Blackham's case*, 1 Salk. 290. *Basset v. Maynard*, Cro. Eliz. 819. 5 Co. 24. Moor, 691, 2. 2 Will. Saund. 47, c.

(*p*) Per Ashhurst, J. 2 T. R. 477, *Smith v. Barrow*.

(*q*) *Rex v. Inhab. of Netherseal*, 4 T. R. 258. *Smith v. Milles*, 1 T. R. 480; *supra*, tit. *Ejectment*; and Vol. I. p. 231.

(*r*) *Smith v. Milles*, 1 T. R. 480.

(*s*) 1 Salk. 301. As to the relation of an administrator's right, see 1 Com. Dig. tit. *Administration*, B. 10. 2 Roll. Ab. 554. l. 15 & 25; and *Rex v. Inhab. of Horseley*, 8 East, 405. The grant of administration as to title to personalty, and the liability of the administrator, relate to the death of the intestate. Ibid.

(*t*) Ca. tem. Hardw. 108. 8 East, 187; *et supra*, Vol. I. 247, 8.

(*u*) *Supra*, Vol. I. p. 248. *Gorton v. Dyson*, 1 B. & B. 219. [See *Beach v. Pears*, 1 Coxe's Rep. 288.]

(*x*) If a man have *bona notabilia*, (i. e. to the value of 5*l.*) in several dioceses of the same province, there must be a prerogative administration; if in two of Canterbury and two of York; there must be two prerogative administrations; and if in one diocese of each province, each bishop must grant one, B. N. P. 141. 1 Salk. 39. Debts due by specialty are deemed to be the deceased's goods in the diocese where the securities happen to be at the time of his death; but debts by simple contract follow the person of the debt-

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Title of administrator.

Cause of action.

that the intestate or testator is still living, or that the will was forged (*y*); or that the grant of administration * has been revoked (*z*), of which the act-book would be good evidence.

The title of an administrator is proved, as has been seen, by the production of the letters of administration (*a*).

The defendant cannot, under the general issue, object that there is another executor who is not joined; he cannot make such an objection, except by plea in abatement, after *oyer* of the probate, that the other executor is still alive (*b*). Neither can advantage be taken of the non-joinder of a co-executor as defendant, except by a plea in abatement, which must allege that the party not joined has administered, which must of course be proved on issue taken on such a plea (*c*).

3. If administration granted to a creditor be afterwards

or, and are esteemed goods in that diocese where the debtor resides at the time of the creditor's death. *Ibid*; and *Byron v. Byron*, Cro. Eliz. 472. Off. of Ex. 46. Godolph. 70. [*Thompson v. Wilson*, 2 N. Hamp. Rep. 292. *Stevens v. Gaylord*, 11 Mass. Rep. 256.] An administration in the Prerogative Court is but voidable, although the intestate has not *bona notabilia*. But if letters of administration be granted by a bishop, or other inferior judge, they are absolutely void. *Prince's case*, 5 Co. 30. *Blackborough v. Davis*, 1 P. Wms. 43, 44. *R. v. Loggen*, 1 Str. 75. But a probate granted by an inferior judge is voidable only. Per Lord Macclesfield, 1 P. Wms. 767, 8; and per Thomson, Baron, *R. v. Whitaker*, Lancaster Sum. Ass. 1810. But see 1 Stra. 75.

(*y*) *Supra*, Vol. I. p. 236. 253.

(*z*) *Supra*, Vol. I. p. 253.

(*a*) *Supra*, 516. Where a bill of exchange was indorsed generally to *A.* as administratrix, for a debt due to *B.* the intestate, and *A.* died after the bill became due, but before payment, it was held that the administrator *de bonis non* of *B.* was entitled to recover. *Catherwood v. Chabaud*, 1 B. & C. 150. For it is now settled, contrary to the old cases, that an administrator may sue in his representative capacity, on a contract made with him as such.

And it is sufficient to make profert of the letters of administration *de bonis non*, *Ibid*. for they prove both administrations. *Ibid*. An administrator *de bonis non* cannot maintain an action to recover equitable assets in the hands of an agent to trustees, and a promise by such agent to pay is a mere *nudum pactum*. *Clay v. Willis*, 1 B. & C. 164. An administrator who has made a wrongful payment (induced by misrepresentation) out of the assets, may recover in his representative character. *Clarke v. Hougham*, 2 B. & C. 149. [See *Walker v. Hill*, 17 Mass. Rep. 380.]

(*b*) Com. Dig. *Abatement*, E. 13. 1 Will. Saund. 291, g, and the cases there cited.

(*c*) *Swallow v. Emberson*, 1 Lev. 161; and 3 T. R. 560. [*Burrow v. Sellers*, 1 Hayw. 501.] Where a creditor is made a co-executor, but neither proves the will nor acts, he may maintain an action against the other for his demand. *Rawlinson v. Shaw*, 3 T. R. 557.

repealed at the suit of the next of kin, the creditor may retain against the rightful administrator ; for where administration is granted to a wrong person, it is only voidable ; but where it is granted in a wrong diocese it is wholly void, and there can be no retainer (*d*). So a payment to one who has obtained probate under a forged will is good against a subsequent rightful administrator (*e*) (1).

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Cause of action.

Where the widow of an intestate delivered goods of the intestate to a creditor of the intestate, in satisfaction of the debt, and the lawful administrator brought trover against the creditor, it was held that this single act of intermeddling by the widow did not constitute *her an executrix *de son tort* (*f*) ; and even if the widow had by her acting rendered herself liable as executrix *de son tort*, it would be very doubtful whether such a delivery could be set up in defence to an action by the lawful administrator (*g*). At all events, it seems that a payment by an executor *de son tort* will not be available either to himself or to the creditor, unless it be made in the due course of administration, and that the payment will not be allowed to the executor *de son tort*, even in mitigation of damages, where there is a deficiency of assets whereby the rightful executor is prevented from satisfying his own debt (*h*).

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Proof of cause of action.

A count by an administrator, on a promise to the intestate, will not be supported by proof of a promise to the administrator (*i*) (2): And where the executor declared on a promise to the testator, in a note made by the testator six years before the action, and upon the plea of *non assumpsit infra sex annos*, the plaintiff proved a promise to himself within the six years, it was held, on a conference by all

(*d*) B. N. P. 141.

(*e*) *Allen v. Dundas*, 3 T. R. 125.

(*f*) *Mountford v. Gibson*, 4 East, 441.

(*g*) *Ibid* ; and see 2 Bl. Comm. 507, 8.

(*h*) *Ibid* ; and see the observation of Lawrence, J. 4 East, 453, 4.

(*i*) *Sarell v. Wine*, 3 East, 409. [3 B. & A. 632.]

(1) [A sale by an administrator is valid, though a will be afterwards discovered, and the administration revoked. *Benson v. Rice*, 2 Nott & M'Cord, 577. And a repeal of letters of administration given to one person, gives no right to a subsequent administrator to sue a bond given to the first. *Gordon v. Woods*, 4 Bibb, 476.]

(2) [Proof of a promise to an executor will not support an averment of a promise to the testator. *Glenn v. M'Cullough*, 2 M'Cord, 212.]

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Actions
against execu-
tors.—No un-
ques executor.

the Judges, that the evidence did not maintain the declaration (*k*) (1).

II. Upon the plea of *ne unques* executor (which must be specially pleaded if the defendant mean to deny that he is such) (*l*), the plaintiff must prove the affirmative. Direct evidence is by the probate, or letters of administration, but as these can seldom be in the power of the plaintiff, notice should be given to him to produce them. It must be presumed that the document, if it exist, is in the defendant's possession, and therefore it seems that the ordinary proof of possession, as preparatory to the admission of parol evidence, is here unnecessary.

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It has already been seen that an examined copy of the act-book, stating that letters of administration were granted to the defendant, are proof that she is administratrix, although no notice has been given to produce the letters of administration (*m*). So it seems that the original will, produced by an officer of the Ecclesiastical Court, bearing the seal of the Court, and indorsed as the instrument on which probate was granted, with the value of the effects sworn to, and on which probate was obtained, is original evidence to prove the probate (*n*).

Executor de
son tort.

The most usual proof that a party is executor, arises from his acts of intermeddling with the property of the deceased, which in law constitutes him executor *de son tort*.

What acts will make a man executor *de son tort* is a question of law ; but it is for the Jury to say whether the facts are sufficiently proved (*o*) ; but it is said, that slight circumstances of intermeddling, are, in point of law, suffi-

(*k*) *Dean v. Crane*, 6 Mod. 309 ; and see 2 Ld. Raym. 1101. [Willes, 27.]

(*l*) And therefore, under the plea of *plene administravit* the defendant cannot show that he acted merely as agent to the executor, B. N. P. 143.

(*m*) Vol. I. p. 248. *Davis v. Williams*, 13 East, 231 ; and see *Elden v. Keddell*, 8 East, 187. See also *Rex v. Barnes*, 1 Starkie's C. 243, *et supra*, Vol. I. p. 248 ; and *Gorton v. Dyson*, *ibid* ; and 1 B. & B. 219. In the latter case, it seems that the original will was indorsed.

(*n*) *Gorton v. Dyson*, 1 B. & B. 219 ; and see the observations of *Richardson, J.* *ibid*. 221.

(*o*) *Padgett v. Priest*, 2 T. R. 97.

(1) [This rule is adopted in Virginia, Pennsylvania, and Maryland. *Fisher's Ex'r. v. Duncan & al.* 1 Hen. & Mun. 563. *Quarles's Adm'r. v. Littlepage & Co.* 2 ib. 401—*Jones v. Moore*, 5 Binney, 573—*Beard v. Cowman*, 3 Har. & M'Hen. 152. *Aliter*, in Massachusetts. *Baxter v. Penniman*, 8 Mass. Rep. 133.]

cient for the purpose (*p*), such as the receiving money of the testator's after his death, although it was received according to an order in his life-time (*q*).

Where a creditor took a bill of sale of the debtor's goods, and allowed them to remain in his possession, *and after the death of the debtor took possession of the goods and sold them, it was held that he thereby made himself executor *de son tort*, since the continuance of the debtor's possession was inconsistent with the deed, which was therefore fraudulent against creditors (*r*) (1). But the interfering for purposes of decency, charity, or kindness, as in ordering the funeral of the deceased, paying his debts or legacies out of the party's own pocket, or taking an inventory of his effects, is not such an intrusion as will render the party liable (*s*).

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son tort.
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The defendant may prove in answer that he acted under the authority of the rightful administrator (*t*), or that he had a claim upon the goods of the deceased (*u*). But it is no defence to show that the defendant acted as the agent of one named as an executor in the will, but who has never proved the will (*x*). Answer.

Where *A.* and *B.* are the executors of *C.*, and on the death of *A.*, *D.* his executor, possesses himself of the effects of *C.*, it seems that he is not liable as the executor of *C.* (*y*). An executor *de son tort* cannot discharge himself from an action by the creditor by delivering over the effects in his possession to the rightful owner after action brought (*z*).

2. Upon issue on the plea of *plene administravit*, it lies on the plaintiff to prove affirmatively that the defendant had *Plene administravit*.

(*p*) *Edwards v. Harben*, 2 T. R. 597.

(*q*) 2 T. R. 597.

(*r*) *Edwards v. Harben*, 2 T. R. 597.

(*s*) 3 Bac. Ab. tit. *Executor*, 21.

(*t*) Peake's C. 86. *Byron v. Byron*, Cro. Eliz. 472. 1 Freem. 102.

(*u*) One who takes possession under a fair claim of right is not chargeable as executor *de son tort*. *Femings v. Jarratt*, 1 Esp. C. 335.

(*x*) *Cottle v. Aldrich*, 1 Starkie's C. 37.

(*y*) *Hall v. Elliott*, Peake's C. 86; but see 5 Co. 33.

(*z*) *Curtis v. Vernon*, 3 T. R. 587. 2 H. B. 18.

(1) [In Tennessee, it has been decided that an administrator is not accountable for the value of articles conveyed by the intestate to his children, though the conveyance may have been fraudulent. *Greenlee v. Hays*, 1 Overton's Rep. 300.]

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assets (a). On this issue no evidence can be * given of assets after the writ sued out (b). And if assets have in fact accrued since the issuing the writ, the plaintiff may, it seems, reply the fact (c).

Proof of assets.

In proof of assets the plaintiff may give in evidence the inventory of the personal estate of the deceased, delivered by the defendant in the Ecclesiastical Court; but a copy of the inventory is not admissible, unless it be signed by the defendant, although it has been signed by the appraisers (d); and he may show that the goods have been undervalued (e). A leasehold estate is assets to the value of the term (f). Evidence of such an inventory is sufficient to throw it on the executor to show how he has disposed of the goods and money specified in the inventory (g).

It has been held, that if the defendant in his inventory does not distinguish between sperate and desperate debts, it is *prima facie* evidence to charge the defendant with all which are not actually stated to be desperate (h); but in a later case Lord Ellenborough required further and reasonable evidence to be given in order to show that the debts had actually been received by the defendant (i). In principle, it seems to be rather unreasonable to construe an admission that a debt is due, and that it is not desperate, * 556 into an * acknowledgment that it has been received unless there be some ground for suspecting fraud; and the *onus* of proof, it is to be recollected, lies on the plaintiff. At all events the defendant may rebut the presumption by proving a demand of the debt, and a refusal to pay it (k), even

(a) The produce of the sale of the good-will of a house held for some time by the administratrix as tenant at will, is assets. *Worral v. Hand*, Peake's C. 74. See *Jury v. Woodhouse*, Barnes, 333.

(b) Per Ld. Kenyon, C. J. in *Mara v. Quin*, 6 T. R. 10.

(c) Per Ashhurst, J. *Mara v. Quin*, 6 T. R. 11.

(d) B. N. P. 140. *Welbourne v. Dewsbury*, per Eyre, C. J. H. 12 Geo. I.

(e) B. N. P. 140.

(f) Ibid; and where the plaintiff, in an action against the administratrix, held a lease in his hands, upon which he had a lien, it was held that the lease was to be considered as assets in the hand of the administrator, who had power to redeem it. *Vincent v. Sharp*, 2 Starkie's C. 507. And assets in Ireland are assets here. Ibid; and 1 Barnes, 240.

(g) *Ayliff v. Ayliff*, B. N. P. 142. *Giles v. Dyson*, 1 Starkie's C. 32.

(h) B. N. P. 140. *Smith v. Davis*, M. 10 Geo. II. Per Hardw. C. J.; *Shelley's case*, 1 Salk. 296. Per Holt, C. J. Went. Off. Ex. 160.

(i) *Giles v. Dyson*, 1 Starkie's C. 32.

(k) *Shelley's case*, 1 Salk. 296; and B. N. P. 240.

in the case of sperate debts. If an executor submit to arbitration, agreeing to pay what shall be awarded, he admits that he has assets (*l*); but a mere submission to arbitration is not an admission of assets (*m*); neither does the payment of interest on a bond amount to such an admission; for it is unreasonable to conclude from his having enough to pay the interest, that he has also enough to satisfy the principal (*n*). So, proof that an administrator admitted that the debt was just, and should be paid as soon as he could, is not evidence to charge the defendant with assets, for he could not be understood to pledge himself to commit a *devastavit*, by paying that debt before others of a higher nature (*o*). But where an executor on being applied to for payment referred the creditor to *A. B.* for information as to assets, it was held that the admission of assets by *A. B.* was equivalent to an admission by the defendant (*p*). If the executor compound with creditors, and in a suit by one plead *plene administravit*, it will be evidence against him of assets (*q*).

Proof of assets.

After proof of assets in the hands of the defendant, it is incumbent on him to discharge himself by proof of the due administration of such assets, which he may * do under this issue (*r*). He may prove the existence (*s*) and payment of debts of as high a degree; but he cannot under this issue give in evidence the payment even of judgment-debts made subsequently to the purchase of the writ; for the question is, whether the defendant had fully administered at the

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(*l*) *Barry v. Rush*, 1 T. R. 691.

(*m*) [*Hoare v. Muloy*, 2 Yeates, 161.] *Pearson v. Henry*, 5 T. R. 6; and a promise by the administrator to pay the debt of the intestate where there are no assets, is *nudum pactum*. Per Buller, *ibid.* [But if he have assets, he is personally bound. *Sleighter v. Harrington*, 2 Taylor, 249. Yelv. 11. note (2) and cases there collected.]

(*n*) *Cleverly v. Brett*, 5 T. R. 8, in note.

(*o*) *Hindesly v. Russel*, 12 East, 232.

(*p*) *Williams v. Innes*, 1 Camp. 364.

(*q*) B. N. P. 145. Per Holt, C. J.

(*r*) He is liable to the amount only of assets in his hands. *Harrison v. Beecles*, cited 3 T. R. 688.

(*s*) B. N. P. 143. 1 Show. 81. 1 Ld. Raym. 745. But even debts on simple contract may be paid before specialties, unless timely notice be given, *Sawyer v. Mercer*, 1 T. R. 690. 1 Mod. 174. 3 Mod. 115. An administrator may prove payment of a simple contract debt without notice of the specialty debt on which the action is founded. Com. Dig. Administration, C. 2d ed. by Kyd. Cro. Jac. 535. 3 Lev. 115. 3 Mod. 115. 1 T. R. 690. [See *United States v. Hoar*, 2 Mason's Rep. 317, 318.]

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time when the action (*t*) was commenced. If the plaintiff reply specially, that he sued out his original on a particular day, and that the defendant had then assets, and the defendant rejoin that he had no assets then, he thereby admits the day of suing out the original as alleged by the plaintiff; but if the plaintiff in his replication allege assets at the time of exhibiting the bill on a day specified under a *videlicet*, and conclude to the country, then, although that day be the first day of the term, the defendant may show that the bill was exhibited afterwards, for he could not in the latter case, as in the former, put the time in issue by his rejoinder (*u*), and the day mentioned in the replication is not material. By this plea the defendant alleges that he has administered the effects of the deceased, paying his debts according to the course and order which the law * 558 prescribes (*x*). He * must prove the existence of the debt, as well as the payment, and for that purpose the creditor himself to whom the debt has been paid is a competent witness (*y*). Where the payments have been made upon

(*t*) *Anon.* 3 Salk. 153. Such payment should be pleaded. *Ibid.* Dyer, 32, a. Where the issue was whether there were assets in the hands of the defendant on the *day* when the writ was sued, and it appeared that he received money on that day, but paid it over by order of the Court on the same day, before the writ was sued out, it was held to be insufficient, and the Jury found assets; but the defendant might have protected himself by pleading the fact specially. *Preston v. Hall*, Clayt. 66. Vin. Ab. Ev. P. b. pl. 3.

(*u*) B. N. P. 144. *Corbet's case*, 1 Leon. 312.

(*x*) See 2 Bl. Comm. 511. According to the rule of priority he must pay, 1st, all funeral charges, and the expenses of proving the will, and the like; and none but necessary expenses are allowed against creditors, nor usually more than 5*l*. See B. N. P. 143. It seems, that the expenses of proving the will are to be allowed under this plea, although not actually paid, the executor being personally liable to them. *Gillies v. Smither*, 2 Starkie's C. 528. 2ndly. Debts due to the King on record or by specialty. 3rdly. Debts, which by particular statutes are to be preferred to all others, as for poors rates. 4thly. Debts of record, as judgments, (if docketted according to the stat. 4 & 5 Will. & Mary, c. 20,) but otherwise not. See *Hickey v. Hayter*, 6 T. R. 384. 5thly. Debts due on special contracts, as for rent, or on bonds, covenants, and the like, under seal. Lastly, debts on simple contracts; viz. notes unsealed, and verbal promises; and amongst these, simple contracts, servants wages have, by some been preferred to any other. 2 Bl. Comm. 511. An executor *de son tort* is entitled to avail himself of payments duly made in the course of administration.

(*y*) B. N. P. 143. *Kingston v. Grey*, 1 Ld. Raym. 745. 1 Show. 81. In *Campion v. Bentley*, 1 Esp. C. 343, it is said that on issue joined on a replication of *per fraudem* to a plea of judgment recovered, the conusee is not competent to prove that it was obtained *bona fide*; *sed quære*.

the testator's bonds they should be produced and proved in the usual way, by means of the attesting witnesses ; and if, upon payment they have been destroyed, evidence cannot be received of their existence, except by means of the attesting witnesses (z).

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tion.

Where the action is on a specialty, he must prove that he paid the debts on bonds or other specialties sealed and delivered ; but where the present action is on a debt by simple contract, he may prove the payment of a debt, without proof of the bond by which it is secured ; for although there was no bond, it was still a good payment in the course of administration (a). A debt for rent *arrere* is equivalent to a debt by specialty (b). * A judgment against the testator not docketed, is to be considered as a debt on simple contract only, and therefore the defendant, under this plea to an action of debt on a judgment against the testator, may give in evidence the payment of bond-debts (c). It is no defence to an action on a bond, that the defendant paid the money over to a co-executor, in order to satisfy the bond, and that he applied the money to the satisfaction of his own simple-contract debts (d). He may give in evidence a retainer for his own debt of equal degree (e), as, that the intestate before marriage with the defendant, gave a bond to J. S. conditioned to leave the defendant 500*l*. and that he retained, to satisfy the obligation (f) ; that he has paid debts out of own money, to the amount of the assets (g). That he has redeemed part of the testator's goods, which had been pawned to their full value, with his own money, and has paid the value of the residue in discharge of his debts (h). So he may show that he has retained money to pay the expenses of administration, to

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Retainer.

(z) *Gillies v. Smither*, 2 Starkie's C. 528. Interest on a bond incurred by the laches of the executor will not be allowed. *Saunderson v. Nichol*, 1 Show. 81.

(a) B. N. P. 143, cites *Kingston v. Grey*, 1 Ld. Raym. 745. In that case it does not appear whether the action was on a bond or simple contract, but probably the latter ; and from the terms of the short report of this case, it seems that the creditor proved the debt.

(b) Bac. Ab. Ev. L. Roll. Ab. 927. Off. of Ex. 145.

(c) *Hickey v. Hayter*, 6 T. R. 384. *Steele v. Rorke*, 1 B. & P. 307. 2 Saund. 7, n. Tidd, 919, 3d edit.

(d) *Cross v. Smith*, 7 East, 246.

(e) *Plumer v. Marchant*, 3 Burr. 1380. It is a general rule, that wherever the executor might have sued for the debt, or might have paid it, he may retain for it. *Ibid*. And see *Bond v. Green*, 1 Brownl. 75. Bro. Ex. 18. See *Harry v. Jones*, 4 Price, 89.

(f) B. N. P. 140, 1. 3 Burr. 1380.

(g) B. N. B. 140. Co. Litt. 123.

(h) *Ibid*.

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which he has made himself liable, although the money has not been actually paid (i).

An executor *de son tort* is not entitled to retain for his own debt, though of higher degree, even although the rightful executor (after action brought) consent to the *retainer (k); but if, under this plea he give in evidence a retainer, the plaintiff cannot object, that as executor *de son tort* he cannot retain without showing the will, and who are rightful executors (l). An executor may also, it seems, give in evidence the payment of the residuary effects to the legatee, after the expiration of a year from the testator's death, without notice of the plaintiff's demand (m); so he may show that he was but executor *durante minore ætate*, and that he paid particular debts and legacies, and delivered over the residue of the testator's personal estate to the infant when he came of age (n), for his power then ceases; and the new executor is liable to all actions (o). But he will be liable for as much as he has wasted (p), to creditors, it seems, as well as to the new executor.

The plea of *plene administravit* admits the debt, but not the amount of it, and therefore, unless the action be of debt for a sum certain, the plaintiff must prove his debt, and the amount of his damages (q).

On issue taken on the plea of *plene administravit præter*, the defendant may prove payment of debts before action brought, as well as under the general plea (r).

An executor cannot, under the plea of *plene administravit*, give in evidence the existence of outstanding debts of a higher nature, without pleading them (s) (1).

Outstanding
bonds.

* 561

3. Where the day of payment on a bond is past, although the defendant sets out the condition in his *plea, he will thereby cover assets to the amount of the penalty, unless the plaintiff reply *per fraudem*; and on issue joined on such replication, proof that the obligee would have taken less

(i) *Gillies v. Smither*, 2 Starkie's C. 528, Cor. Abbott, L. C. J.

(k) *Curtis v. Vernon*, 3 T. R. 587.

(l) B. N. P. 143. But see Peake's Ev. 349. 3d ed.

(m) 1 Esp. C. 276. Cor. Ld. Kenyon, C. J.

(n) 1 Mod. 174. He should produce the letters of administration.

(o) Ibid.

(p) Ibid. And 6 Co. 19, *Packman's case*; and Latch, 160. But see 1 Mod. 175.

(q) 1 Salk. 296. B. N. P. 140.

(r) *Smedley v. Hill*, 2 Bl. Rep. 1105.

(s) B. N. P. 141.

(1) [In what cases a special plea of *plene administravit* is necessary at the common law, and under statutes in Massachusetts—see *United States v. Hoar*, 2 Mason's Rep. 311.]

than the penalty, and not exceeding the sum which the executor had to pay, will be evidence of fraud (t).

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Upon a replication of *per fraudem* to a plea of judgment recovered, evidence that the creditor would have taken less than the sum, is evidence of fraud, unless the executor show that he had not assets to pay that amount (u). Evidence in such case, that the judgment was confessed for more than the true debt, is strong, but not conclusive, evidence of fraud, and the defendant may show in answer that the judgment was entered for more than was due, by mistake (x). If several judgments be pleaded, and any one be proved to be false and fraudulent, the plaintiff will succeed as to all (y). It will be presumed that an obligation entered into by the testator is founded on a just debt, unless the contrary be averred in pleading, and issue taken upon it (z). Upon the plea of a retainer and judgment recovered, it is sufficient for the plaintiff to falsify either claim (a).

Judgment recovered.

Outstanding bond, &c.

4thly. If an executor suffer judgment by default, or judgment be given against him on a demurrer to the declaration; or if he plead payment of a bond, and omit to plead *plene administravit*, or *plene administravit præter*, it will operate as an admission of assets in an action against him on the judgment, suggesting a ** devastavit* (b); for it is an universal principle of law, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it in another action founded upon it, or in a *scire facias* (c). And, therefore, in an action against an executor on a judgment suggesting a *devastavit*, on issue taken on the plea of *non devastavit*, it is sufficient to prove the judgment, and the return of *nulla bona* to the *fieri facias* (d).

Debt on judgment.
Plea non devastavit.

* 562

Whether the defendant plead *non devastavit* to a *scire fieri*

(t) B. N. P. 141. If issue be taken on the existence of the bonds, the defendant must prove them, and if he fail as to one he will fail as to all, 1 Salk. 312.

(u) 1 Salk. 312. B. N. B. 142.

(x) *Pease v. Naylor*, 5 T. R. 80.

(y) 1 Salk. 312. B. N. P. 142.

(z) Cro. Jac. 35. B. N. P. 142.

(a) *Campion v. Bentley*, 1 Esp. C. 243.

(b) *Erving v. Peters*, 3 T. R. 685. *Ramsden v. Jackson*, 1 Atk. 292. *Rock v. Leighton*, 1 Salk. 310. 1 Ld. Raym. 589. Hob. 199.

(c) Per Buller, J. 3 T. R. 689. See 2 Stra. 732.

(d) *Erving v. Peters*, 3 T. R. 685. *Skelton v. Hawling*, 1 Wils. 259. *Chaloner v. Chaloner*, cited *ibid*.

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IV.Non devasta-
vit.

inquiry, or *nil debet*, or not guilty, or *non devastavit* to an action of debt against him, suggesting a *devastavit*, he cannot give in evidence the want of assets (*e*); nor can he do so upon a writ of inquiry after judgment by default in the original action (*f*); nor would a previous judgment be evidence for him (*g*), for although under the issue of *non devastavit* the defendant may give in evidence any matter which would have been a discharge to him under the plea of *plene administravit* (*h*), yet under the latter plea the former judgment would not be evidence.

On issue taken on the plea of *non detinet* to an action of debt, suggesting a *devastavit*, the issue is on the defendant, the judgment being conclusive as to assets (*i*).

A promise by an executor to pay a debt of the testator, where there are no assets, is a mere *nudum pactum* (*k*), even * 563 although he has given a written promise (*l*); * but *assumpsit* will lie against an executor on a promise made by the testatrix to pay a debt for which she gave her bond during coverture (*m*).

After the executor's assent to a legacy of a specific chattel, an action lies against him to recover it. The proof of title will be similar to that already stated in the action of ejectment (*n*); if the plaintiff bring trover he should prove a demand, and refusal, subsequent to the assent, and before the commencement of the action.

FALSE PRETENCES.

It is necessary to prove (*o*), 1st, The pretence as laid in the indictment; 2dly, Its falsity; 3dly, The obtaining the goods or money as alleged; 4thly, By means of the false pretence; 5thly, With the intent specified.

Proof of the
false pretence.

1st. It is not essential to prove that the prisoner used the very words which constitute the false pretence, as al-

(*e*) 3 T. R. 693. 1 Will. Saund. 219, c.

(*f*) *Treil v. Edwards*, 6 Mod. 308. 2 Str. 1075.

(*g*) *Rock v. Layton*, 1 Ld. Raym. 591.

(*h*) Per Gould, J. *Rock v. Layton*, 1 Ld. Raym. 591.

(*i*) *Hope v. Bague*, 3 East, 2.

(*k*) 5 T. R. 6. [Yelv. 11, note (2).]

(*l*) *Rann v. Hughes*, 7 T. R. 350. n. See *Parker v. Baylis*, 2 B. & P. 73.

(*m*) *Lee v. Muggridge*, 5 Taunt. 36.

(*n*) *Supra*, 519.

(*o*) Under the stat. 30 Geo. II. c. 24, s. 1. 52 Geo. III. c. 64. See Stark. Crim. Pleadings, tit. *False Pretences*.

leged in the indictment, it is sufficient to prove acts and conduct which virtually amount to the false pretence laid. Thus, where the pretence alleged was that the prisoner pretended that a paper produced to the prosecutor was a true paper, and that it had been signed by *W. S.* It appeared that in fact the prisoner, when he offered the paper, (which was in the form of a promissory note for ten shillings and sixpence, and resembling those which were generally circulated in the neighbourhood on the credit of *W. S.*) made no representation whatsoever; but the *learned * 564 judge (*p*) was of opinion that the offering the note as genuine was equivalent to a representation that it was so, and the twelve judges all held afterwards that the conviction was right (*q*).

The proof of the pretence must correspond with the allegations in the indictment. An allegation that the defendant pretended that he had paid a sum of money into the Bank of England is not supported by proof that he said that the money had been paid into the Bank (*r*). Where several act in concert, the pretence conveyed by the words of one, in the presence of the rest, will support an allegation of a false pretence by all (*s*).

2dly. The proof of the falsity of the pretence must of course correspond with the allegations.

3dly. The obtaining the money or goods.—This offence borders frequently very close upon felony, for if the property be obtained with intent to defraud the owner, the only criterion for judging of the nature of the offence is this, whether the owner divested himself wholly of the property by the delivery, or merely parted with it for a temporary purpose. If *A. animo furandi* pretend to *B.* the owner of a horse, that he has been sent for it by *C.*, who requested to borrow it, and *A.*, by this mean obtain the horse, and sell it, he is guilty of larceny, and in such case cannot, it seems, be indicted for obtaining the horse by false pretences; but if *A.* in such case, and with the like intention, were to obtain from *B.* a sum of money on pretence that *C.* wanted to borrow it, and would repay it an-

(*p*) *Graham, B.*

(*q*) *Freeth's case*, Stafford Lent. Ass. 1807. *Russel*, 1392. See also *Story's case*, *ibid.*

(*r*) *Rex v. Plestow*, 1 Camp. 494, Cor. Ld. Ellenborough.

(*s*) *Young v. The King*, 3 T. R. 98. It is not necessary to prove that the whole pretence as set out on the indictment is false, for part may be true, and part false, even although the whole be alleged to be false. See the observations of the Judges in *R. v. Perrott*, 2 M. & S. 379.

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Proof of obtaining, &c.

other time, the offence would not amount to felony ; (t) the distinction is, that in the one case the owner meant to part * entirely with the whole property, in the other with the temporary possession only. If on an indictment for the misdemeanor the offence appeared to be felony, the prisoner would be entitled to an acquittal, for otherwise he might be punished twice for the same offence, for he could not afterwards plead his conviction in bar of an indictment for felony.

Ownership.

An allegation that the prisoner obtained from *A.*, the servant of *B.*, three shillings of the monies of *B.*, by falsely pretending that nine shillings were due for the carriage of a parcel, whereas six shillings only were due, is not supported by proof that *A.* paid the three shillings out of his own money, having no money of *B.*'s in his hands at the time (*u*), for it would be merely optional in *B.* to reimburse *A.* ; but it seems that if in such case *A.* had had three shillings of the money of *B.* in his possession, the evidence would support the allegation (*x*).

Where the prisoner was charged with obtaining money, and it appeared that in fact he had obtained a bank-note, it was held that it might be presumed that he had received the money at the bank (*y*) ; but as the stat. 52 Geo. 3, c. 64, specifies bank-notes, &c. it is probable that a variance would now be held fatal.

By means of the false pretence.

4thly. By means of the false pretence.—It is sufficient to show that the money was obtained immediately by the means and instrumentality of the false pretence, although a previous confidence subsisted which rendered that pretence effectual ; as where an agent, employed by the prosecutor to pay wages to his servants every week, delivered in a false account of payments, by means of which he obtained a larger sum than was due (*z*).

5thly. The intention to defraud. See tit. *Forgery*.

* 566

*FALSE RETURN, see *Sheriff*.

FEOFFMENT.

· If the issue be *feoffavit vel non*, and a deed of feoffment

(t) *Coleman's case*, 1 Leach, 303, n. a. *Atkinson's case*, East's P. C. 673.

(u) *Rex v. Douglass*, 1 Camp. 212, Cor. Ld. Ellenborough.

(x) *Ibid*.

(y) *Hales's case*, 9 St. Tr. 76.

(z) *Witchell's case*, East's P. C. 830.

and livery be proved, the defendant cannot adduce evidence to prove that it was made by **win** to defraud creditors, for it is a feoffment, and the covin ought to have been specially pleaded; but if the issue had been seised or not seised, the covin would have been evidence, for he remains seised as to creditors notwithstanding the feoffment (a).

FINE.

The chirograph of a fine is evidence of it, because the chirographer is appointed by the law to give out copies of the agreements between the parties that are lodged of record (b). But where the fine is to be proved with proclamations (c), as it must be, to bar a stranger, they must be proved by an examined copy of the roll, for the chirographer is not authorized to make out copies of the proclamations, and therefore his indorsement on the back of the fine is not evidence of them (d).

A fine does not operate until it has been executed (e).

* Both parties and privies to a fine are absolutely barred * 567 by it (f); and so are *strangers*, who have at the time of levying the fine a present interest, unless they interpose their claim within five years after proclamations made (g), provided they do not labour under some legal impediment (h); such persons have five years allowed in which to prosecute their claims after such impediments are removed (i). Those

(a) B. N. P. 257. Hob. 72. A feoffment might be by livery without deed. Gil. L. E. 85, and may be so pleaded. But if a man plead a feoffment, *per fait*, *quare* whether he can give a parol feoffment in evidence. Ibid. and 2 Roll. Abr. 672. *Semble*, if a demise be pleaded by deed, evidence of a parol demise is not admissible. Gilb. L. Ev. 86. *Vide supra*, tit. *Corporation*.

(b) B. N. P. 229; & *supra*, Vol. I. p. 154.

(c) A fine without proclamations makes a discontinuance, but does not bar the estate-tail. Com. Dig. tit. *Fine*, G. 1. And see 27 Edw. I.; the stat. 4 Hen. VII. c. 24; 31 Eliz. 2; 2 And. 109.

(d) *Chettle v. Pound*, B. N. P. 229. *Allen's case*, 13 Car. I. Clayt. 51.

(e) Plowd. 357, b. It may be executed either by entry or by writ (West, Symb. 85. Com. Dig. *Execution*, A. 6); by writ of *habere facias seisinam* within the year, or *scire facias* afterwards. Ibid. and Com. Dig. *Fine*, E. 15.

(f) 2 Inst. 516. Com. Dig. *Fine*, I. And privies to a fine are those who claim under the parties by any right of blood, or other right of representation. 3 Co. 87. 2 Bl. Comm. 355.

(g) See the stat. 4 Hen. VII. c. 24.

(h) Coverture, infancy, imprisonment, insanity, and absence beyond sea.

(i) Stat. 4 Hen. VII. c. 24.

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whose rights accrue after the levying the fine and proclamations made, originating in some cause anterior to the fine, must prosecute their rights within five years after the time when such rights accrue (*k*). But as against one who has no seisin of the estate, even although he has a chattel interest in it, as a term for years (*l*), the levying a fine operates nothing, but may be defeated under the plea that a *partes finis nihil habuerunt* (*m*). The payment of rent by the tenant in possession to the conusor of the fine is *prima facie* evidence of the seisin of the latter (*n*); but the mere receipt of rent by a stranger to the legal title is not sufficient (*o*). Proof that a writ of possession, after a recovery in ejectment was executed on the evening of the 6th of November, * 568 the first day of term, by the entry of the officer on the land, and his claiming it for the cognizor, although the possession of the tenant who afterwards paid rent to the cognizor was not actually changed, was held to be evidence of a seisin to support a fine levied on the 8th of November, but relating to the 6th (*p*); and it seems that the receipt of rent after a fine has been levied for a period antecedent to the fine, is *prima facie* evidence of the cognizor's possession of the premises during the time for which rent was received (*q*).

FOREIGN LAW.

THE existence of a foreign law or custom is to be proved as a matter of fact, by evidence to show what the law or custom is; and the Court will not presume that the law, even of Scotland, agrees with that of England upon any

(*k*) 4 Hen. VII. c. 24. When once the five years have begun to run, they go on, notwithstanding any subsequent disability. *Doe v. Jones*, 4 T. R. 300. But if a person labour under several impediments, he shall have five years after the last impediment removed. 1 Lev. 215. Plowd. 375, a. [Ballentine, Chap. III.]

(*l*) 5 Co. 124. Hardr. 401.

(*m*) Hob. 334.—Except as against parties or privies. A fine levied by a mortgagor in fee, who remains in possession after the day of payment, is a nullity, for he has no freehold. In order to constitute a title by disseisin there must be a wrongful entry. *Hall v. Doe and Surtees*, 5 B. & A. 687; and see *Doe v. Perkins*, 3 M. & S. 271. *Smartle v. Williams*, 1 Salk. 245. *Rowe v. Power*; 2 N. R. 1. 1 East, 575.

(*n*) *Doe d. Foster v. Williams*, Cowp. 621. 11 East, 495.

(*o*) B. N. P. 104; *supra*, tit. *Ejectment*, 507.

(*p*) *Doe d. Osborn v. Spencer*, 11 East, 495.

(*q*) *Ibid.* per Ld. Ellenborough.

particular point (*r*) ; and it is clear, that the written law of a foreign country must be proved by documents properly authenticated, and not by *parol* (*s*). And in one instance it has been held (*t*) that the unwritten law of a foreign country must also * be so proved (*u*) (1). Before an instrument made in a foreign country can be admitted in evidence which derives a legal effect and operation from the law of that country, the existence of the law itself must be proved by witnesses (*x*) (2). An instrument purporting to

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(*r*) And therefore, where the plaintiff's cause of action in *assumpsit* arose in Scotland, Ld. Eldon held that the defendant was bound to prove that the defence of infancy was available by the law of Scotland. *Male v. Roberts*, 3 Esp. C. 163.

(*s*) *Clegg v. Levy*, 3 Camp. 166, [and Mr. Howe's note.] As to impeach the validity of an agreement. *Ibid.* and *Millar v. Heinrich*, 4 Camp. 155. [*Talbot v. Seeman*, 1 Cranch, 38. *Church v. Hubbard*, 2 Cranch, 187.]

(*t*) In the case of *Boehtlinck v. Inglis*, (3 East, 380), evidence was admitted of one of the mercantile navigation laws of Russia, and also of a documentary opinion of the Judges of the Custom-house Court of St. Petersburg, on the effect and operation of that law, signed by the presiding Judges of that Court ; and a question on a special case was reserved for the opinion of the Court of K. B. upon the admissibility of the latter document ; but the Court gave no opinion.

(*u*) *Boehtlinck v. Schneider*, 3 Esp. C. 58, per Ld. Kenyon, C. J.

(*x*) *Ganer v. Lady Lanesborough*, Peake's C. 17, Cor. Ld. Kenyon. If an action be brought on a contract, made in a country where the liability of the defendant differs from his liability in this country, it lies on the defendant to show it. *Brown v. Grace*, 1 D. & R. 41. [See *Le Roy & al. v. Crowninshield*, 2 Mason's Rep. 151.]

If a defendant justify an arrest in a foreign country, *qu.* whether it be not incumbent on him to prove that it was justifiable according to the law of that country. *Mure v. Kaye*, 4 Taunt. 34. See *Mostyn v. Fabrigas*, Cowp. 174. In order to prove the written law of a foreign country, it seems that an examined copy of the original law ought to be produced. In *Picton's case*, 24 Howell's St. Tr. 494, Lord Ellenborough said, "In order to prove the written law of any nation, a copy of that law should be produced. If I were sitting at Guildhall, and proof of foreign regulations was necessary, I should require an authenticated copy of those regulations."

On a question as to the law of Jewish marriages, Lord Stowell directed questions to be addressed to the tribunal of the Bethdin, and the answers were received and acted upon in analogy to the practice of the Court of Chancery, where the law of a foreign coun-

(1) [If foreign laws respecting trade be not positively shown to have been in writing as public edicts or statutes, they may be proved by *parol* testimony. *Livingston v. Maryland Insurance Co.* 6 Cranch, 274.]

(2) [The public laws of a foreign nation, on a subject of common concern to all nations, promulgated in the United States, by the

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be a divorce under the seal of the Synagogue at Leghorn is not admissible to prove such divorce, unless the law of the country be previously established (y).

FORGERY.

Proof of for-
gery.

It is necessary to prove :—1st. A making within the county ;—2ndly, That it was a false making in law and in fact ;—3dly, Of the particular instrument set forth ;—4thly, With intent to defraud, &c.

A making
within the
county.

It is essential in the first place to *connect* the prisoner with the instrument alleged to be forged, as by evidence of his having uttered or published it, or of its being found in his possession (v).

It is seldom that direct evidence can be given of the fact of forgery. In the case of negotiable securities the evidence is usually applied to the uttering rather than to the

try is received, not on oath, but on a reliance on the honour and integrity of the professors of that law ; and further information was received on the depositions of persons conversant in that law. *Lindo v. Belisario*, 1 Haggard, 216.

(y) Ibid. And see *Mure v. Kaye*, 4 Taunt. 34. *Burrows v. Jemino*, 2 Str. 733. *Fremoult v. Dedire*, 1 P. Wms. 429. *Feaubert v. Turst*, 1 Brown's P. C. 38. As to proof of an Irish stat. *vide* Vol. I. p. 164.

(v) Evidence of a delivery of a forged bank note by A. to B. in order that B. may put it off, is a disposing and putting away by A. within the statute 15 G. 2. c. 13. *R. v. Palmer*, 1 N. R. 96.

national executive, may be read in evidence in the courts of the U. States, without further authentication or proof. *Talbot v. Seeman*, 1 Cranch, 38.

It is said by Washington, J. that the written or statute laws of foreign countries must be proved by the laws themselves, *if they can be procured* ; if not, inferior evidence of them may be received : Unwritten laws or usages may be proved by parol evidence, and when proved, it is for the court to construe them, and decide upon their effect. *Consequa v. Willings & al.* 1 Peters' Rep. 229. See also *Seton v. Delaware Ins. Co.* Circuit Court, April 1808, and *Robinson v. Clifford*, Circuit Court, April 1807. Wharton's Digest, 229.

In *Kenny v. Clarkson*, 1 Johns. 385, it was held that foreign statutes cannot be proved by parol ; but that the common law of a foreign country may be shown by the testimony of intelligent witnesses of that country. See also *Woodbridge v. Austin*, 2 Tyler's Rep. 367. *Frith v. Sprague*, 14 Mass. Rep. 455. In *Smith v. Elder*, 3 Johns. 105, the confession of the defendant that he had carried goods contraband by the laws of G. Britain, was held to be sufficient evidence of the law of that country, in an action for putting prohibited goods on board a vessel bound thither, in consequence of which the vessel was seized, and the owner (the plaintiff) put to expense in procuring her release.]

forging, although both are usually charged. Where the instrument is not of a negotiable nature, as in the case of a bond or will, after proof that the instrument has been forged by some one, a strong presumption necessarily arises against the party in whose favour the forgery is made, or who has the possession of it, and seeks to derive benefit from it. Evidence that the instrument so proved to have been forged is * in the hand-writing of the prisoner, must, * 570 if unexplained, necessarily be strong evidence of guilt (z).

Comparison of hands is not evidence to prove the forgery; but, as will be seen, persons of skill may be admitted to give their opinion, whether the particular hand-writing on the forged instrument is natural and genuine, or feigned and imitated; because, as it is said, a judgment may be formed upon such points by habit and experience (a). So where the question is, whether a seal has been forged, engravers of seals may testify as to the difference between a genuine impression and the one alleged to be false (b). Proof must also be given that the offence was committed within the county. The bare fact of finding the forged instrument in the county where the party who forged it was at the time, is not *prima facie* evidence that he forged it in that county. *a* Brown being an accomplice of Parkes, who had forged a note, uttered it in Middlesex, in the absence of Parkes, who was apprehended in the same county, with forty similar notes in his possession, dated Rington, Salop, and a majority of the Judges held, that there was no evidence of the commission of the forgery in Middlesex (c). In *Crocker's* case, the prisoner being indicted in the county of Wilts, it appeared that whilst he was in London, his lodgings in Wiltshire were searched in the presence of his wife, and in a pocket-book (in which his name had been written by himself) the note in question was found, bearing date more than two months before, at * which time he * 571 was in another county; the prisoner was convicted, but afterwards received a pardon, on the ground (as has been stated) that a majority of the Judges were of opinion that

A making
within the
county.

(z) See *R. v. Parkes & Brown*, East's P. C. 964.

(a) See tit. *Hand-writing*. *Cary v. Pitt*, Peake's Ev. Appen. lxxxv. *R. v. Cator*, 4 Esp. C. 117.

(b) By Ld. Mansfield, C. J. in *Foulkes v. Chad*, cited Russel, 1509; and Phill. on Ev. 227.

(c) *R. v. Parkes & Brown*, 2 East's P. C. 992. *infra* 572.

PART false instrument in the name of another, whether the pri-
IV. soner assumes to be that other, being a real person, or does
 not, is a forgery (s). And also, that the making of an in-
 strument in the name of a non-existing person is forgery (t),
 although the name be assumed by the party at the time for
 the purpose of fraud, and to avoid detection, and the cre-
 dit be given to the person and * not to the instrument (u),
 and although no additional credit be obtained by the false
 name (x).

False making.

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In *Aickles's* case, where the prisoner drew a bill in the name of John Mason, No. 4 Argyle-street, Oxford-road, and it appeared that the prisoner had assumed the name (the residence being correct) a month before, considerable doubt seems to have been entertained by the Judges on the question, whether this amounted to forgery, although the Jury found that the name had been assumed for the purpose of that very fraud (y). This finding seems, however, to decide the point; if the lodgings had been taken, and the name assumed, but one hour before the making of the instrument, there would have been no room for doubt, and the lapse of a month can make no difference, for it is still one act of contrivance for the purpose of fraud. The continued residence and use of the name might indeed be evi-

(s) *Dunn's* case, East's P. C. 966; where the prisoner assumed the name of Mary Wallace, a real person, and signed a note in the name of the latter, in the presence of the prosecutor. *Hadfield's* case, Russel, 1425. Ev. Coll. St. Vol. 6, p. 580; where the prisoner pretended to be the Hon^{ble} Augustus Hope, and drew the bill in question in his name.

(t) *Lewis's* case, Fost. 166; where the prisoner forged a power of attorney in the name of Elizabeth Tingle (a non-existing person), administratrix of her father, R. Tingle, a seaman. *Bolland's* case, East's P. C. 958. Leach, 83; where the prisoner indorsed the name of Banks (a non-existing person) on a genuine bill. *Lockett's* case, East's P. C. 940; where the prisoner made an order on a banker in the name of a fictitious person, purporting to be made by one who kept cash there.

(u) *Sheppard's* case, East's P. C. 967. 1 Leach, 226; where the prisoner obtained goods at a silversmith's in the name of Turner, and gave a draft in that name; and where the prosecutor swore that he gave credit to the prisoner, and not to the draft.

(x) *Taft's* case, East's P. C. 959. The bill, with a general indorsement upon it, had been stolen, and on offering it to be discounted at a banker's, being required to indorse it, the prisoner, Edward Taft, wrote upon it the name of John Williams. *Taylor's* case, East's P. C. 960; where the prisoner having unduly obtained a bill of exchange, obtained payment from the drawee, and indorsed a receipt on the bill in the name of William Wilson (a fictitious person), held to be forgery, Buller, J. *dubitante*.

(y) East's P. C. 969. 970. 6 Ev. St. 580. Russel, 1436.

dence to a Jury that the prisoner was, for legal purposes, the person he assumed to be in making the instrument, but its effect is defeated by their finding that this was for the purpose of committing the fraud, in other words, it is a finding that he was not the person in whose name the note was drawn.

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IV.

False making.

Where the prisoner has signed a bill of exchange, or other instrument, in a name which he has assumed, * and * 575 which he alleges to be his own name, it is a question of fact for the consideration of the Jury whether (although the name be not strictly his own), he has habitually used it, and become known by it, or whether he has assumed it for the purpose of committing the particular fraud. If he has acquired the name which he has used, by habit and reputation, so that he is known and recognized by it, he is not guilty of a false making in the use of it; but if he has adopted and assumed it for the very purpose of committing the fraud, it is but part of the contrivance itself, and therefore can afford no defence to the charge of forgery; it can make no difference in such case, whether the name was assumed immediately before and preparatory to the perpetration of the crime, or some time before (z).

It is essential to prove the falsity of the instrument, either by showing that the writing is not that of the * person by whom it purports to have been made, or by showing that no such person exists; in the former instance, it is necessary, in the first place, to identify the person whose

False making
in fact.
* 576

(z) Where the prisoner, Samuel Whiley, drew a bill in the name of Samuel *Milward*, to pay for goods ordered by him of the prosecutor at Bath, seven or eight days before in the same name, and it appeared that on the day before he ordered the goods he put a brass plate with the name of *Milward* on his door at Bath, (where he had lived for about a month previous to the transaction), the prosecutor stated that he took the draft on the credit of the prisoner whom he did not know. The learned Judge left it to the Jury to say, whether the prisoner had not assumed the name *Milward* in the purchase of the goods and delivery of the draft, in order to defraud the prosecutor, and they found in the affirmative; and the Judges afterwards held, that fraud having been found by the Jury, the conviction was right. (*Whiley's case*, Cor. Thomson, B. Somersetshire Sp. Ass. 1805* and afterwards by the Judges, Russel, 1439). So where the prisoner Francis made an order on a banker for the payment of money in the name of *Cooke*, it was proved that the prisoner's real name was Francis, although he had occasionally assumed other names; it was left to the Jury, whether, in the particular instance, the prisoner had assumed the name for the purpose of fraud, and the Jury finding the fact, the Judges held that the conviction was right. (*R. v. Francis*, Russel, 1440); four of the Judges were absent.

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IV.

False making
in fact.

hand-writing is afterwards to be negatived, with the person whose instrument the prisoner meant to imitate.

In *Sponsonby's* case (a), the prosecution for forging an indorsement by William Pearce, the payee of a genuine bill, failed, because Davis the drawer was not called to prove that the William Pearce, whose signature was negatived, was the real payee of the bill.

If the description on the face of the bill apply to several persons, the signatures of all must be negatived.

It may be proved by circumstances, that the prisoner meant to simulate the writing of a particular person.

Where the bill purported to have been drawn by Andrew Holme, payable to John Sowerby, and the prisoner, on negotiating the bill, stated that John Sowerby, the indorsee, was the son of John Sowerby, of Liverpool, a cheesemonger, the father was examined as a witness, and proved that there was no other person but his son in Liverpool to whom the description given by the prisoner, applied, and also proved that the indorsement had not been written by his son. It was objected, that Andrew Holme, the drawer, ought to have been called in order to prove who the payee really was, but it was held to be a sufficient answer, * that the prisoner had acknowledged that the signature of Andrew Holme (his uncle) was a forgery (b).

* 577

On an indictment for personating the proprietor of stock, and forging his signature, the latter was admitted to prove facts tending to show that he was the party personated (c).

Proof of descriptive averments.

3. Proof must be given of those averments which are necessarily introduced upon the record, to show that the forged instrument was of the description of those the forgery of which is prohibited by the statute, as that it was a bond, will, or receipt. Thus where the indictment is for forging a receipt for money on a navy-bill, evidence is requisite to

(a) *Leach*, 374, Cor. Adair, Serj. Some evidence of identity was certainly requisite, but it seems to be very doubtful whether it would, as laid down in the above case, be essential to call the drawer as the best witness of the fact. It was there held, that the fact, that the William Pearce produced as a witness, was intimate with the drawer, and had received a letter from him, signifying that such a bill had been remitted to him, and directing the application, was not sufficient evidence of identity. *Tamen qu.*

On an indictment for uttering a forged acceptance, purporting to be the acceptance of W. & Co. No. 3, Birchin Lane, it is not sufficient to prove that is not the acceptance of W. & Co. No. 20, Birchin Lane, *R. v. Watts*, 3 B. & B. 197.

(b) *Doones's* case, East's P. C. 977.

(c) *Parr's* case, East's P. C. 997.

show, as averred, that the signature of the party upon the bill operates as a receipt (*d*).

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IV.

In *Wall's* case (*e*), on an indictment for forging a will of lands, where the will set forth purported to have been attested by two witnesses only, the Judges held that the prisoner had been improperly convicted for want of evidence at the trial to show what estate the supposed testator had in the lands so devised, since in the absence of such proof it was to be presumed that the estate was freehold.

Proof of descriptive averments.

Where the indictment alleged that a bill of exchange had been signed by H. Hutchinson, and it appeared that the signature was a forgery, it was held that the variance was fatal (*f*).

It seems to be a general rule, that if the forged instrument appear on the face of it to be valid as the *instrument which it is alleged to be, an indictment lies for forging it, although from some collateral fact the instrument, if genuine, would not have been available; but that it is otherwise where the defect appears on the face of the instrument itself. Thus an indictment is maintainable for forging a conveyance, although the estate may be described by a wrong name (*h*); for forging a will, although the supposed testator be still living (*i*), or be described in the forged will by a wrong christian name (*k*); or for forging a bill of exchange, or other instrument, on paper not stamped (*l*), although no stamp could legally be impressed upon the instrument after it was made; consequently such an instrument is admissible in evidence on an indictment for forgery, although unstamped (*m*). And in general, no evidence of collateral facts is available in defence for the purpose of showing that the instrument could not, if genuine, have been legally enforced.

* 578

The purport of a writing is that which appears on the

Purport variance.

(*d*) *R. v. Hunter*, Leach, 711.

(*e*) East's P. C. 953. *Tamen qu.* for how could it make any difference, whether the supposed testator had or had not lands upon which the will, if genuine, could operate. *Qu.* what the averments were in the indictment.

(*f*) *Carter's* case, East's P. C. 985.

(*h*) *Japhet Crook's* case, Str. 901. For other instances, see Stark. Crim. Pleadings, 110, 2d edit.

(*i*) *R. v. Murphy*, 10 St. Tr. 183. *R. v. Sterling*, Leach, 117. *Coogan's* case, 2 Leach, 503.

(*k*) *Coogan's* case, East's P. C. 948.

(*l*) *R. v. Hawkeswood*, Leach, 295. East's P. C. 955. *R. v. Morton*, *ibid.* *R. v. Reculist*, *ibid.* 956. *R. v. Davis*, *ibid.*

(*m*) *Ibid.*

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IV.Proof of de-
scriptive aver-
ments.

face of it, and if the writing when produced does not appear to be that which according to the allegation it purports to be, the variance will be fatal (*n*), as, where the indictment stated that the bill purported to be a bank-note, and the instrument produced in evidence was in the form of a promissory note, "I promise to pay, &c. for Self and Company of my bank in England (*o*)" (1).

- * 579 * If the instrument given in evidence correspond with the description in the indictment, but is defectively executed in any respect, it is a question for the Jury whether it is a counterfeit of the kind of instrument the forgery of which is charged; and if the resemblance be sufficient to impose upon persons of ordinary observation, although persons of experience could not have been deceived, it will be sufficient to support the allegation of forging the particular description of instrument, or a paper writing purporting to be that instrument; as where, on an indictment for forging a bank-note it appeared that the word pounds was omitted in the body of the bill (*p*); and there was no water-mark on the paper; so where the notes were so ill executed, that the difference between the false and genuine notes was very apparent in several particulars, some persons having in fact been deceived by them (*q*).

An allegation that the whole of an instrument was forged is proved by evidence of an alteration of a genuine instrument for the purposes of fraud (*r*).

Intent.

4thly. The *intention* to defraud must be proved as averred (*s*). Such an intention is usually evidenced principally by the act itself, which, from its nature, in general leaves

(*n*) See East's P. C. 883. Doug. 302. *R. v. Reading*, Leach, 672.

(*o*) *R. v. Jones*, Cor. Ld. Mansfield—Doug. 302. 2 East's P. C. 883.

(*p*) *R. v. Elliott*, 2 East's P. C. 951. 2 N. R. 93.

(*q*) *Hoost's case*, Cor. Le Blanc, J. 2 East's P. C. 950.

(*r*) *Supra*; and *Dawson's case*, East's P. C. 978. 1 Str. 19. Stark. Crim. Pl. 91, 92. *Teague's case*, East's P. C. 172. See further as to variance, tit. *Variance.—Perjury*; and Stark. Crim. Pleadings, 2d edit. 101. 253. [*The State v. Waters*, 2 Const. Rep. 669.]

(*s*) East's P. C. 854, 988. 1 Leach, 215.

(1) [An indictment for forging a note of a bank incorporated by the name of "The President and Directors of the Bank of South Carolina," is not supported by the production of a note of a bank incorporated by the name of "the Bank of South Carolina." *The State v. Waters*, 2 Const. Rep. 669. See *Commonwealth v. Boynton*, 2 Mass. Rep. 77. See also *United States v. Cantril*, 4 Cranch, 167.]

no room for doubt upon the point. The inference is frequently confirmed by the conduct and behaviour of a guilty party, in the artifices and falsehoods which he employs for the purpose of effecting his object, or of avoiding detection. The subsequent uttering or publication of the forged instrument is admissible and strong evidence to prove the original * design in forging the instrument; and whether the making or uttering of a forged instrument be done with intent to injure a particular person as alleged, is matter of evidence to the Jury (t). * 580

Proof of intention.

Where the intent as laid was to defraud *A.*, *B.*, &c. the stewards of the feast of the Sons of the Clergy, and it appeared that the individuals specified were trustees of a charitable fund, and that the money which had been obtained by means of the forgery was trust-money, it was held to be sufficient, since the money was theirs as against all the world but subscribers (*u*).

It is sufficient to show that concealment was the object of the forgery (*x*); and the assumption of a name which the party writes as his own, is evidence of an intention to evade responsibility under a feigned name, and so to defraud (*y*).

If the intent to defraud a corporation be alleged, an intent must be proved to defraud them in their corporate capacity; and if an intent to defraud several in their individual capacities be alleged, and it should appear that the real intention was to defraud them in their corporate character, it seems that the variance would be fatal (*z*).

Where a wife, in pursuance of directions given by her husband, utters a forged instrument in his absence, they may be tried together, and the wife may be convicted as a principal in the felony, and the husband as an accessory before the fact (*a*). Where the witness, in consequence of a communication with the husband, went to his * house, and there saw the wife, where the communication between the husband and the witness was mentioned, and the wife sold to the witness several forged notes, and delivered them to him, and after the delivery, but before change had been * 581

Principals and accessories, &c.

(t) *Barrow's case*, 2 East's P. C. 989. 1 Leach, 77. *Elseworth's case*, East's P. C. 989.

(u) *R. v. Jones & Palmer*, East's P. C. 991. 1 Leach, 366.

(x) *R. v. Aickles*, East's P. C. 968. *Shepherd's case*, East's P. C. 967.

(y) *Ibid.*

(z) See *R. v. Jones & Palmer*, East's P. C. 991.

(a) *R. v. Morris*, Leach, 1096.

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IV.Principals and
accessories.

received by the witness out of the money given to the wife, the husband put his head into the room and said, get on, but did not otherwise interfere, it was held, that the wife might properly be convicted; for although the law, out of tenderness to the wife, when a felony (*b*) is committed in the presence of the husband, raises a *prima facie* presumption in her favour of coercion by the husband, yet it is necessary that the husband should be actually present and taking part in the transaction (*c*).

Proof of utter-
ing with a
guilty know-
ledge.

Proof that the prisoner exhibited a forged instrument as a true and genuine instrument, is evidence that he pronounced or published it (*d*). With respect to the proofs on this subject, see tit. *Coin* (*e*).

Defence.

On an indictment for forging a will it is no defence to show that probate of the will has been granted by the Ecclesiastical Court (*f*).

* 582
Competency.

* Formerly, upon a conviction for forgery, the forged instrument was condemned, and ordered to be destroyed. Hence a party who would, if the instrument had been genuine, have had an interest in its destruction, either because he would have been liable upon it, or because it would have barred his claim against another, was regarded as an incompetent witness, since, at all events, the proof against him was rendered much more difficult by a conviction. The objection to competency has survived the practice on which it was founded, and hence the rejection of witnesses on this ground has been considered to be an anomaly (*g*), for it is certainly irreconcilable with the general

(*b*) But the rule does not extend to cases of murder.

(*c*) 1 Hale, 46. Kel. 37. East's P. C. 559. *Hughes's case*, Cor. Thomson, B. Lancaster Lent Ass. 1813, MS.

(*d*) East's P. C. 972. 3 Inst. 172.

(*e*) *Supra*, 378. See also *R. v. Ball*, 1 Camp. 324. The prisoner uttered a forged bank-note on the 17th of June, and evidence was admitted that on the 20th of March preceding he had uttered a 10*l.* note of the *same* manufacture, and that there had been paid into the Bank of England various forged notes, dated between the preceding months of December and March, all of them of the same manufacture, and having different indorsements upon them of the hand-writing of the prisoner. It was also proved, that when apprehended, he had in his possession paper and implements fit for making notes of the same kind with those produced. All the Judges were of opinion that the evidence was admissible to prove the prisoner's intention.

(*f*) *R. v. Buttery & Macnamara*, Cor. Garrow, B. O. B. 1817; and afterwards by the Judges. And see Vol. I. p. 236. 253.

(*g*) See Ld. Ellenborough's observations, *R. v. Boston*, 4 East, 582. And see 2 East's P. C. 993.

principles now established on the subject of interest (*h*). It has been said, that where the prisoner, if the instrument were genuine, might sue the witness upon it, the latter has a direct interest in the conviction, because it is not to be presumed that the Crown would, after conviction, attempt to establish a claim upon that instrument against the witness (*i*); and that although the instrument were made for the benefit, not of the prisoner but of a third person, and although the conviction would not be evidence against that person being in *inter alios*, yet that an impediment would be thrown in the way of his recovery, since the Court would impound the forged instrument; and the party convicted could no longer be a witness (*k*).

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Competency.

The general rule is, that a party who has an interest in setting aside the instrument, supposing it to be *genuine, * 583 is an incompetent witness for the Crown, on a prosecution for forgery.

Thus, a party is incompetent to prove that an instrument, purporting to be a receipt given by him to the prisoner is a forgery (*l*), or that the indorsement on a note, purporting to be payable to witness or order, has been forged (*m*), or the forgery of a letter of attorney to transfer stock in the witness's name (*n*), or the forgery of his name on the certificate of a navy-bill, as a receipt for the money on an assignment (*o*) (1).

(*h*) See tit. *Interest*.

(*i*) Co. Litt. 352. 2 Inst. 39.

(*k*) *R. v. Whiting*, 1 Salk. 283. 1 Ld. Raym. 396. 2 Haw. c. 46. 424. East's P. C. 994; but see *R. v. Bray*, R. T. Hardw. 358. *Smith v. Prager*, 7 T. R. 63.

(*l*) *Russell's case*, Leach, 8. *Reeve's case*, ibid. 812.

(*m*) *Caffey's case*, East's P. C. 995. [See 2 Evans's Pothier, 315.]

(*n*) *R. v. Rhodes*, 2 Str. 728.

(*o*) *Thornton's case*, 2 Leach, 634. See also *Crocker's case*, 2 N. R. 87. 2 Leach, 987.

(1) [The English rule that excludes a party, whose signature is alleged to be forged, from testifying in support of an indictment for the forgery, is adhered to in Connecticut, Vermont and North Carolina. *The State v. Brunson*, 1 Root, 307. *The State v. Blodget*, ibid. 534. Swift's Ev. 70. (See *vide* Mr. Day's note (1) 2 N. R. 96.) —*The State v. A. W.* 1 Tyler, 260—*The State v. Hamilton*, 2 Hayw. 288. In New Hampshire, Massachusetts and Pennsylvania, he is held to be competent, as in other analogous cases. *Furber v. Hilliard*, 2 N. Hamp. Rep. 481—*Commonwealth v. Hutchinson*, 1 Mass. Rep. 7. *Commonwealth v. Snell*, 3 ib. 84—*Pennsylvania v. Farrel*, Addison's Rep. 246. *Respublica v. Ross*, 2 Dallas, 239. S. C. 2 Yeates, 1. *Respublica v. Keating*, 1 Dallas, 110. But the indorser

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So an executor of a person whose name has been forged is not competent as a witness for the Crown (*p*).

It has been said, that although a witness who is interested in the instrument cannot be admitted to give evidence tending to prove the forgery, he is still competent to prove collateral facts. The *principle* of this distinction appears to be very questionable, for it is in the *result*, that is, in the *conviction*, that the witness is interested; hence it should seem that if an interest in the result disqualifies him as a witness to any one fact tending to that result, it must also render him incompetent to testify as to any other fact of the same tendency. Suppose, by way of illustration, that it is essential to prove the service of a particular notice upon the prisoner, and that there is no witness to prove the fact, except the party whose name is alleged to have been forged, in such a case his interest in committing perjury would be just the same as if he offered himself to prove the fact of forgery.

- * 584 * It is said to have been held in *Treble's* case, that the supposed maker of a note, purporting to be made payable on demand, at his own house, or at his bankers in London, was competent to prove that he had not made it payable at the bankers where it purported to be payable (*q*), yet here the evidence seems to have tended to the very fact of forgery itself.

So upon an indictment for personating the proprietor of stock, and forging his signature, the latter was admitted to prove the amount of the stock which he had at the bank

(*p*) *R. v. Bunting*, East's P. C. 996. *R. v. Rhodes*, Leach, 31. But see B. N. P. 284. An executor is a bare trustee claiming no interest under the will. Upon an indictment for the forgery of the signature of a trustee to a power of attorney for the sale of stock, but which was not sold, a co-trustee is a competent witness. *R. v. Wait*, 1 Bing. 121.

(*q*) *Treble's* case, 2 Taunt. 328. 2 Leach, 1040.

of a forged note, who admits his signature, is not a competent witness, unless he has paid or satisfied the holder. *Respublica v. Ross*, ubi sup.

In Massachusetts, the party whose name is forged cannot be a witness on an indictment, unless the forged instrument is produced at the trial, or is secreted to screen the offender. *Cases cited above.*

In New York, the Supreme Court, in 1794, adopted the English rule—but in *The People v. Howell*, 4 Johns. 296, Mr. Chief Justice Kent says—since that time, the question of interest in a witness has been investigated and defined with more precision both in England and New York—that the exclusion of the party, in the case of forgery, has become an anomaly in the law of evidence, and it would seem to be fit and proper that the rule should no longer be applied.]

(although not to prove the false signature) for the purpose of showing the intention to defraud him, as alleged in the indictment (*r*). On an indictment for forging a promissory note which bore an indorsement by the prisoner, of the receipt of a year's interest, it was held that the supposed maker was not competent to negative the fact of payment, because it tended to prove the forgery; but all the Judges agreed that such a witness was competent to prove all the facts perfectly collateral (*s*). The objection to competency in such cases no longer rests upon any principle, although the practice has become too inveterate to be wholly rejected; yet it is obvious that it ought to be strictly restrained within its ancient limits; and upon this ground, perhaps, the distinction between evidence of the very fact of forging, and collateral facts may have proceeded.

Competency

The objection to competency ceases where the witness has no interest in the destruction of the instrument. Thus, where *A.* drew a bill on *B.* payable at * the banking-house * 585 of *C.*, *B.*'s acceptance having been forged, but *C.* having given him credit to the amount, although he had paid the bill; *B.* was held to be competent to prove the forgery (*t*). So where the party whose receipt has been forged, has recovered the amount from the prisoner (*u*). So the supposed testator may prove the forgery of his will (*x*). So a witness may be rendered competent by a release (*y*) as from the holder to the drawer, there being no other name on the note.

So one who signs an instrument as the mere agent of another, as a cashier at the Bank, who gives security for the faithful discharge of his duty, is competent to prove the forgery of his name, for he is not responsible on the instrument, and it is not to be presumed that he acted criminally and fraudulently in breach of his duty (*z*). of an agent.

Another question arises, whether, when the person whose writing is forged *may* be called, he must be called; it seems Agent need not be called.

(*r*) *R. v. Parr*, East's P. C. 997.

(*s*) *Crocker's case*, 2 N. R. 87. 2 Leach, 987. It is said that Ld. Ellenborough, C. J. Macdonald, C. B. and Lawrence and Le Blanc, Js were of opinion, that the witness was competent on all points, except the fact of forgery.

(*t*) *Usher's case*, East's P. C. 999. *Testick's case*, Ibid. 1000. 12 Mod. 338.

(*u*) *R. v. Wells*, B. N. P. 289. *Dean's case*, 12 Vin. Ab. 23.

(*x*) *Coogan's case*, 2 Leach, 503. *R. v. Sterling*, East's P. C. 1003. *R. v. Murphy*.

(*y*) *R. v. Akehurst*, Leach, 178. *Dr. Dodd's case*.

(*z*) *R. v. Abraham Newland*, East's P. C. 1001.

PART now to be settled that he need not, although the point has
IV. been much discussed, and even decided differently (*a*). But
 _____ upon indictments for the forging of bank-notes, it has been
Competency. held that the supposed signature of the bank clerk may be
 disproved by any person acquainted with his hand-writing,
 without calling him (*b*). The objection that secondary
 evidence is substituted for the best, does not apply in this
 * 586 case, since there is not such a * distinction between one
 man's knowledge of his own hand-writing, and the know-
 ledge of another on the same subject as constitutes (*c*) the
 former evidence of a superior degree to the latter.

This rule, as to the incompetency of a witness, does not,
 it seems, extend to civil proceedings, for there the result
 did not occasion the destruction of the instrument as in
 prosecutions for forgery (*d*). In a late case, upon the trial
 of an action against an agent for negligence in transacting
 the purchase of an annuity, the supposed surety was ad-
 mitted to prove that the deed which purported to have
 been executed by him was a forgery (*e*).

FRAUD.

Effect of fraud. FRAUD is an extrinsic collateral act which vitiates all
 transactions, even the most solemn proceedings of courts
 of justice. *Ld. Coke* says it avoids all judicial acts, eccle-
 siastical or temporal.

**As to civil
 suits.**

In civil suits all strangers may falsify for covin, either
 fines, or real or feigned recoveries, and even a recovery by
 a just title, if collusion was practised to prevent a fair de-
 fence; and this, whether the covin is apparent upon the
 record, as not essoining, or not demanding the view, or by
 suffering judgment by confession or default; or extrinsic,
 as not pleading a release, collateral warranty, or other ad-
 vantageous pleas (*f*).

(*a*) *Capt. Smith's case*, *East's P. C.* 1000.

(*b*) *Hughes's case*, *Cor. Le Blanc*, *East's P. C.* 1000. *McGuire's*
case, *ibid.* [*United States v. Holtsdau*, 2 *Hayw.* 379. *Common-*
wealth v. Cary, 2 *Pick.* —. *Furber v. Hilliard*, 2 *N. Hamp. Rep.*
 480. *The State v. Ravelin*, 1 *Chipman's Rep.* 295. See *Post*, 652,
 note (1).]

(*c*) *Vide Part III. tit. Best Evidence.*

(*d*) But yet the Court, it seems, have the power of impounding
 forged deeds proved to be forged in civil cases.

(*e*) *Hunter v. King*, *Cor. Holroyd*, *J. Guildhall Sitt.* after *Mich.*
Term, 1 *Geo. IV.* and afterwards by the Court of *K. B.*

(*f*) See *tit. Fine*; & *supra*, Vol. I. 253, 4. A party who has con-
 veyed an estate in order to confer a colourable qualification to kill
 game, cannot allege his own fraud to defeat the conveyance, *Doe*

In criminal proceedings, if an offender be convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed * by a purchaser whose conveyance would be affected as it stands; * 587 and even after a conviction by verdict he may traverse the time (g).

In the proceedings of the Ecclesiastical Court the same rule holds. In *Dyer* there is an instance of a second administration, fraudulently obtained, to defeat an execution against the first; and the fact being admitted by demurrer, the Court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked, and the fact being denied, issue was joined upon it; and the collusion being found by a Jury, the Court gave judgment against it. Ecclesiastical proceedings.

In the more modern cases, the question seems to have been, whether the parties should be admitted to prove collusion, and not seeming to doubt but that strangers might (h).

So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a Jury, and determined in the courts of temporal jurisdiction.

And as fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the Ecclesiastical Courts, which, from the nature of their proceedings, are at least as much exposed, and which have been in fact as much exposed, to be practised upon for sinister purposes, as the courts of Westminster-hall (i).

* Where fraud depends upon the intention of a party, * 588 the existence of that intention is usually a matter of fact,

d. *Roberts v. Roberts*, 2 B. & A. 367; *Hawes v. Leader*, Cro. J. 270. A tenant cannot insist against the will of the lord that his own act amounts to a forfeiture, *Doe v. Bancks*, 4 B. & A. 401.

(g) Vol. I. p. 224, 5.

(h) *Vide supra*, Vol. I. p. 242, 3. A party to the suit in the Ecclesiastical Court cannot be admitted to show that the sentence has been fraudulently obtained. See *Prudham v. Phillips*, Ambl. 763.

(i) The above is part of the judgment of L. C. J. De Grey, in the *Duchess of Kingston's* case, in which the Judges came to the following resolutions:—First, That a sentence in a Spiritual Court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy; but, secondly, Admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to be obtained by fraud or collusion.

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which must be found by a Jury (*k*), who are to decide on questions of *mala fides*. In some instances it results, by inference of law, from the particular circumstances of the case, as found by the Jury (*l*).

FRAUDS, STATUTE OF. 29 Car. II. c. 3.

THE provisions of this celebrated statute seem to operate principally as rules of evidence, calculated for the exclusion of perjury, by requiring, in particular cases, some more satisfactory and convincing evidence than mere oral testimony affords; they dispense with no evidence of consideration which was requisite previous to the statute (*m*); they give no efficacy to written contracts which they did not possess before.

It would be inconsistent with the object of the present treatise to enter into a discussion of the different clauses of this statute, little more is proposed than to refer briefly to the decisions upon the subject.

Sec. 1. Crea-
tion of estates,
&c.

* 589

By sec. 1. "It is enacted, that all leases, estates, interests of freehold, or terms of years, or any uncertain * interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of *leases or estates at will only*."

Exception as
to leases.

Sec. 2. "Except all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised."

It has been held, that the purchase of a standing crop of mowing grass is not within the first section (*n*), and that it does not apply to a parol agreement for an easement for

(*k*) See tit. *Bankruptcy*, 148.—*Coin*.—*Deceit*.—*Fraudulent Conveyance*.—*Forgery*.—*Intention*.

(*l*) See tit. *Bankruptcy*, 154; and see the observations of Buller, *J. Estwick v. Caillaud*, 5 T. R. 426.

(*m*) *Rann v. Hughes*, 7 T. R. 350. *n*. 4 Bro. P. C. 27. *Barrell v. Trussel*, 4 Taunt. 121. Neither do they make it necessary to allege in a declaration that the promise is evidenced as the statute requires; but in a plea it is otherwise, if the agreement pleaded can have no effect unless it be in writing. Com. Dig. *Action on the Case*, F. 3. *Case v. Barber*, T. Ray. 450. [S. C. T. Jon. 158.]

(*n*) *Crosby v. Wadsworth*, 6 East, 610. But it is within the 4th section. *Ibid*.

seven years in the lands of another, such as a right of way, or privilege of stacking coals (*o*), or for a liberty to the party to nail the frame-work of a sky-light against the wall of a house (*p*).

“*Shall have the force and effect of leases or estates at will only.*”—Notwithstanding these words, where a tenant has held for two or three years under a parol demise for twenty-one years, he is to be considered a tenant from year to year (*q*), the year's tenancy commencing on the same day of the year with the parol lease (*1*). Where there was a parol agreement for a lease for seven years, the tenant to enter at Lady-day, and quit at Candlemas, it was held, that the landlord could not put an end to the * tenancy except * 590 at Candlemas, for the tenants in such cases are considered to be tenants from year to year; and although by the statute of Frauds, the agreement be void as to the duration of the lease, it governs the terms on which the tenancy subsists in other respects (*r*). A parol lease for three years, to commence *in futuro*, is not good (*s*).

Sect. 3 enacts, “That no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be *assigned, granted or surrendered*, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.”

Section 3. Assignments, surrenders of existing estates and, interests.

The statute has been held to extend to a parol assign- Assignments.

(*o*) *Wood v. Lake*, Say. 3. *Webb v. Paternoster*, Palm. 71. 2 Rol. Rep. 143. Note, in the former case the party, in addition to the liberty of stacking hay, was also to have the use of the close, which distinguishes it from the latter case. [See Phil. Ev. 3d ed. p. 355, note. 7 Taunt. 384. S. C. 2 Marsh. 560.]

(*p*) *Winter v. Brockwell*, 8 East, 310.

(*q*) *Clayton v. Blakey*, 8 T. R. 3. But note, that he had held for several years, and been treated as a yearly tenant.

(*r*) *Doe d. Rigge v. Bell*, 5 T. R. 471. See Watkins's Elements of Conveyancing, 4. Hargrave's notes to Co. Litt. 55. 4 Taunt. 128; where it was held that a letting without restriction as to time, creates a tenancy at will. See also Evans's Stat. Vol. I. p. 234.

(*s*) *Raoulins v. Turner*, 1 Ld. Raym. 736.

(1) [In Massachusetts, tenants under a parol lease for a year are mere tenants at will, by force of st. 1783, c. 37. *Rising & al. v. Stannard*, 17 Mass. Rep. 285. *Ellis v. Paige & al.* 1 Pick. 45.]

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ment of a lease from year to year (t) (1), and to surrenders of tenancies from year to year (u); and therefore a mere parol agreement between a landlord and tenant to determine the tenancy in the middle of a quarter is not binding (x).

* 591 The mere cancelling of a lease is not a sufficient surrender within this clause (y), but a surrender of a lease by deed may be effected by writing without deed, as, where a mortgagee wrote upon the mortgage deed, a receipt for principal and interest, adding, "I do release and discharge the within premises from the term of 500 years." (z).

Surrender by
operation of
Law.

Or by act and operation of law.—The taking a new lease by parol is by operation of law a surrender of the old one (a), although it be by deed (b), provided it be a good one, and pass an interest according to the contract and intention of the parties, for otherwise the acceptance of it is no implied surrender of the old one (c). Where A. by parol, let a house to B. who underlet it to C., and then A., with B.'s assent, accepted C. as his tenant and received rent from him, it was held that the substitution involved a surrender; for it was made with the assent of B. which could not be without a surrender of the former lease (d). So where it was agreed between the landlord, and tenant

(t) *Botting v. Martin*, 1 Camp. 317, Cor. Sir A. M'Donald, C. B.

(u) 2 Camp. 103. 2 Starkie's C. 379. And see *Magennis v. McCullough*, Gilb. Eq. C. 236.

(x) *Thomson v. Wilson*, 2 Starkie's C. 379. *Mollett v. Brayne*, 2 Camp. 103.

(y) *Roe v. The Archbishop of York*, 6 East, 86.

(z) *Farmer v. Rogers*, 2 Wilson, 26.

(a) See 1 Wil. Saund. 236, b.

(b) Ibid. and see *Thomas v. Cooke*, 2 Starkie's C. 408.

(c) *Wilson v. Sewell*, 4 Burr. 1980. *Davison v. Stanley*, Ibid. 2210. 1 Will. Saund. 236, b. and the cases there cited.

(d) *Thomas v. Cooke*, 2 Starkie's C. 408, Cor. Abbott, J. and afterwards by the Court of K. B. 2 B. & A. 119.

(1) [If a person affix his signature and seal to the back of a lease, it is not an assignment of the lease. *Jackson v. Titus*, 2 Johns. 430. And if it be agreed between him and the person to whom it is intended to be assigned, that a third person should write an assignment over the signature and seal, which he does, and delivers the deed to the assignee, the assignment is a nullity. *ibid.* But an assignment of a lease by writing not under seal is good. *Holliday v. Marshall*, 7 Johns. 211. A parol agreement by a joint lessee of a salt-well for seven years, to transfer his interest to the other lessee, is void by the statute. *M'Dowell v. Delap*, 2 Marsh. 33.]

that another tenant should be substituted for him, which was done, it was held that the first tenancy was thereby determined (*e*). Where the landlord having had a dispute with his tenant, told him that he might quit when he pleased, and the tenant accordingly quitted in the middle of the quarter, it was held that the landlord was entitled to recover in an action for use and occupation for the whole quarter (*f*). But where the landlord accepted from his tenant the key of the demised house in the middle of the quarter, * it was held that the former could not recover in respect of any subsequent rent (*g*).

* 592

Sec. 4.—No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate (*h*), or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Section 4.
Executory
promises and
agreements.

No action shall be brought.—The statute does not apply where an action is brought to recover money paid on an executed consideration for the use of the plaintiff, although by the operation of the statute the money could not have been recovered from the party who paid it. *A.* being the

Money paid on
an executed
consideration.

(*e*) *Stone v. Whiting*, 2 Starkie's C. 235, Cor. Holroyd, J. And see *Whitehead v. Clifford*, 5 Taunt. 518. See also *Harland v. Bromley*, 1 Starkie's C. 455; *Ward v. Mason*, 9 Price, 291; *Harding v. Crethorne*, 1 Esp. C. 57. An engagement, in consideration of staying proceedings on a bill of exchange against *W. P.* in these terms: "Mr. *W.* will engage to pay the bill drawn by *W. P.* in favour of *S. S.*" is insufficient. *Saunders v. Wakefield*, 4 B. & A. 595; see also *Goodman v. Chase*, 1 B. & A. 297; *Jenkins v. Reynolds*, 3 B. & B. 14; *Russel v. Moseley*, 3 B. & B. 211.

An engagement, "to pay you on *T. L.*'s account, 50*l.*, at the expiration of the usual credit, on the event of any deficiency on his part so to do," is insufficient. *Atkinson v. Carter*, 2 Chit. Rep. 403; *Pace v. Maule*, 1 Bing. 216; *Boehm v. Campbell*, 3 Moore, 15; *Head v. Liddard*, 1 Bing. 196, *infra*.

(*f*) *Mollett v. Brayne*, 2 Camp. 103, Cor. Ld. Ellenborough, and afterwards by the Court of K. B.

(*g*) *Whitehead v. Clifford*, 5 Taunt. 518.

(*h*) See *Rann v. Hughes*, 7 T. R. 350. *n.* A mere promise in writing without consideration will not bind the executor.

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Admission.

Debt of another.

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tenant of *B.* and restrained from assigning without the consent of *B.*, agreed to pay to *B.* 40*l.* out of 100*l.* to be paid to him by another tenant for the goodwill, if *B.*'s consent to the substitution could be obtained. The new tenant was cognizant of the agreement, took possession, and paid the money to *A.* who promised to pay the 40*l.* to *B.*, it was held that *B.* might recover the 40*l.* from *A.* as money had and received to the use of *B.* (i), for the consideration was past, and the * statute out of the question, but it would have been otherwise if the new tenant had not paid the money, and the action had been brought against him (k).

If the party admit that he has made an agreement which is binding under the statute, the admission renders the proofs prescribed by the statute unnecessary; as where he has paid money into Court upon a count charging him with an agreement which could not have been proved, except through the medium of written evidence (l).

But if the party merely admit the fact that an agreement was made, but do not admit that an agreement was made in a manner which would be binding under the statute, the admission will not dispense with the statutory proof. If a party, in his answer in Chancery, admit the agreement generally, without insisting upon the statute, the Court will hold it to be good (m), but if the defendant merely admit an agreement in fact, and insist that it is void under the statute, the Court will not enforce it (n). So if a parol agreement be stated in a Court of law, a demurrer would admit the agreement, and yet still advantage might be taken of the statute (o);

Or to charge the defendant upon any special promise to answer for the *debt, default, or miscarriage* of any other person.

Where therefore there is no debt, or default of another, the case is not within the statute. Where one brings an action against another for an assault, and the defendant, in consideration that the plaintiff * will withdraw the record, undertakes to pay a sum of money and costs, he is liable (p);

(i) *Griffith v. Young*, 12 East, 513.

(k) Per Le Blanc, J. 12 East, 513. [See p. 596, note (2).]

(l) *Middleton v. Brewer*, Peake's C. 15.

(m) Prec. in Chanc. 208. 374. 2 H. Bl. 66.

(n) *Rondeau v. Wyatt*, 2 H. Bl. 66.

(o) 2 H. B. 68. By Ld. Loughborough, in delivering the judgment of the Court. This is to be understood of a demurrer to a plea which ought to show that the agreement was valid under the stat.

(p) *Read v. Nash*, 1 Wils. 305. This was on demurrer to the

or this is an *original promise*, and it does not appear that there has been any default or miscarriage of any other person. So where the plaintiff, at the request of the defendant, advanced a sum of money to pay workmen in the garden of the defendant's infant grandson, the case was held to be without the statute, the money having been advanced on the defendant's credit, for the infant was not liable (*q*); so where the defendant buys goods at an auction without naming his principal (*r*).

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IV.

Sec. 4.
Debt of another.

It is a question for the Jury, whether the credit, before the debt was incurred, was given to the defendant, or to another as the principal, taking into their consideration the amount of the debt, the situation of the parties, and all the other circumstances of the case (*s*), if upon notice given by the defendant to the plaintiff to produce his books, it appear that the credit was not originally given to the defendant, but to another, it is strong but not conclusive (*t*) evidence against the plaintiff (*u*), that the defendant was but a surety. Where the vendor refuses to deliver goods on the credit of *A. B.* and the defendant undertakes absolutely to pay the amount, the promise need not be in writing, for this is in effect a sale to the defendant as principal, not to *A. B.* to whom no credit was given.

Question to whom the credit was given.

* So where the defendant is under a legal obligation to pay for a benefit received by another, the promise need not be in writing, as where an overseer promises to pay an apothecary for the cure of a pauper (*x*); but where it appears that another than the defendant is liable as the principal, the case is within the statute, unless the defendant bind himself upon an express promise, founded upon a new consideration, to pay the debt.

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Where the person to whom the goods are furnished is

declaration, which did not allege that any assault had been committed. And see 3 Burr. 1890, where Wilmot, J. observed, that it was not a promise to pay the debt of another person, the defendant was himself originally liable. See also *Stephens v. Squire*, 5 Mod. 205. [*Allaire v. Ouland*, 2 Johns. Cas. 52. *Slingerland v. Morse*, 7 Johns. 463. *Leonard v. Vredenburg*, 8 Johns. 29.]

(*q*) *Harris v. Huntsbach*, 1 Burr. 373.

(*r*) *Simon v. Motivos*, 3 Burr. 1921.

(*s*) 1 B. & P. 158.

(*t*) *Keate v. Temple*, 1 B. & P. 158.

(*u*) *Croft v. Smallwood*, 1 Esp. C. 121, [and Mr. Day's note.] See *Legge v. Gibson*, Selw. 756, n. 7.

(*x*) B. N. P. 281. And see 3 B. & P. 250. 4 M. & S. 275. 1 B. & A. 104.

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Debt of another.

* 596

New consideration.

liable, credit having been originally given to him (y), another is not liable without a note in writing. As where the promise is to see another paid for goods, or for labour supplied to a third person; as, to see a surgeon paid if he would cure J. S. of a wound (z). A promise to see the plaintiff paid amounts to a promise to pay (a); as where the defendant said 'you must supply my mother-in-law with bread, and I will see you paid' (b). (1) In such cases the very form of the promise seems to imply the intention of the defendant to render himself liable as surety only, and points out the principal. So an undertaking by the defendant, that if the plaintiff would lend his gelding to J. S., the latter would re-deliver it, is within the statute (c). And so it was held, where the defendant said, 'I will pay you if J. S. will not;' and the goods were *afterwards* delivered (d). Where A. falsely pretending that he was * authorized by B. to order goods on his credit to be delivered to C., promised to see the vendor paid, it was held that he was not liable, either on his promise, or for goods sold, but that he would be liable in an action on the case for the deceit (e). An undertaking to guarantee the payment of a note is within the statute (f).

But next, any person may bind himself by an express parol promise, founded upon a new consideration, to pay the amount of another person's debt. (2) As where A.

(y) *Matson v. Wharam*, 2 T. R. 80. *Anderson v. Hayman*, 1 H. B. 120. *Lerington v. Clarke*, 2 Vent. 223.

(z) *Watkins v. Perkins*, 1 Ld. Raym. 224. *Oldham v. Allen*, Mich. 24 Geo. III. MS. 96. *Robinson v. Pulsford*, 1 Vent. 43. 2 Keb. 563.

(a) *Robinson v. Pulsford*, 1 Vent. 43. 2 Keb. 563.

(b) 2 T. R. 80, Cowp. 227. [*Erwin v. Wagoman*, Cooke's Rep. 402.]

(c) *Buckmyre v. Darnall*, 2 Ld. Raym. 1085. 1 Salk. 27. 6 Mod. 248.

(d) *Jones v. Cooper*, Cowp. 227. But see *Mowbray v. Cunningham*, cited Cowp. 228.

(e) *Thomson v. Bond*, 1 Camp. 4.

(f) *Ex parte Adney*, Cowp. 460.

(1) [Where the defendant inquired of the plaintiff the terms on which he would furnish newspapers to the defendant's nephew to sell and distribute, and said "If my nephew should call for papers, I will be responsible for the papers that he shall take," it was held that this was an original undertaking, and not within the statute. *Chase v. Davy*, 17 Johns. 114.]

(2) [If a promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt, and one moving

having a lien upon policies of insurance in his hands, delivers them up to an agent of the owner, on an agreement that the defendant, the agent, will pay the amount of a bill drawn by his principal, and accepted by *A.* for the accommodation of the principal (*g*). The principle of this and

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(*g*) *Castling v. Aubert*, 2 East, 325. And see *Houlditch v. Milne*, 3 Esp. C. 87. *Barrell v. Trussell*, 4 Taunt. 117. [*Siau v. Pigott*, 1 Nott & M'Cord, 124.]

between the parties to the new promise, it is not within the statute, but is an original promise. Per Kent, C. J. *Leonard v. Vredenburg*, 8 Johns. 29. *Jones v. Ballard*, 2 Rep. Con. Ct. 113. *Aliter*, if the whole credit is not given to the person who comes in to answer for another. Per Kent, C. J. *ubi sup.* See also *Leland v. Creyon*, 1 M'Cord, 100. S. P. If *A.* in consideration that *B.* will deliver him goods, and that *C.* will discharge *B.* from execution, promise to pay *C.* the amount of the execution; this is an original undertaking, and not within the statute. *Skelton v. Brewster*, 8 Johns. 376. So if *A.* being bound to indemnify *B.* in a suit in which he is arrested, request *C.* to become special bail for *B.* and promise to indemnify him. *Harrison v. Sawtel*, 10 Johns. 242. S. P. *Perley v. Spring*, 12 Mass. Rep. 297. See also 11 Johns. 221, *Bailey v. Freeman*. So if *A.* in consideration of a sale of land to him by *B.* promise *C.* to be accountable to him for debts due to him from *B.* *Gold v. Phillips*, 10 Johns. 412. So where *A.* promised *B.* not to require payment from him of a certain note, in consideration of which *B.* promised to indemnify *A.* from one third of all loss in consequence of his indorsing certain notes for *C.* *Myers v. Morse*, 15 Johns. 425. So where *A.* subscribed to pay the trustees of a religious society a certain sum annually towards the support of a clergyman, and *B.* in consideration of a certain sum, agreed to indemnify *A.* against all claims arising from his subscription. *Conkey v. Hopkins*, 17 Johns. 113. So where *A.* deposited a certain sum of money and goods in *B.*'s hands, on an agreement that *B.* should pay a certain note indorsed by *C.* for *A.*'s accommodation, and should indemnify *C.* against the note. *Olmstead v. Greenly*, 18 Johns. 12. See also *Underhill & al. v. Gibson & al.* 2 N. Hamp. Rep. 352.

Where a husband and wife were about separating, and a friend of the wife promised the husband to pay for the board of the children, if he would sign the articles of separation—the promise was held not to be within the statute. *Hughes v. Creyon*, 2 Rep. Con. Ct. 257.

If a person promise to pay the amount of a debt which he owes to a creditor of him to whom it is due, and to save him harmless from the demand of his creditor—such promise is not within the statute. *Colt v. Root*, 17 Mass. Rep. 229. *Sed vide Waggoner v. Gray's Adm'rs.* 2 Hen. & Mun. 603. A defendant having funds in his hands, and making an express parol promise to pay the debt of another, is liable notwithstanding the statute. *Raymer v. Sim*, 3 Har. & M'Hen. 451. The undertaking of assignees, to whom property has been delivered for the purpose of paying creditors, is not within the statute. *Drakeley v. Deforest*, 3 Conn. Rep. 272.

The statute does not apply to promises raised by implication of law. *Allen v. Pryor*, 3 Marsh, 306. *Goodwin & al. v. Gilbert*, 9 Mass. Rep. 510.]

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Sec. 4.
New consideration.
For the sale
of lands.

missed, because the marriage was not contracted in *expectation* of 3,000*l.* (*r*).

Contract or sale of lands, &c.—The main distinction between this branch of the 4th section and the 1st section, is, that the 1st section relates to the actual creation of interests in lands, the *fourth* to executory contracts for the creation of such interests. A sale by auction is within this clause (*s*).

Lands, tenements or hereditaments, or any interest in or concerning them.—It has been held, that a contract for the purchase of a growing crop of grass, to be mown and made into hay by the vendor (*t*), and conferring a *right to make a profit of the surface of the land, or for the sale of growing turnips, their maturity not being stated (*u*), or of growing trees for hop-poles (*v*), or for the abatement of the tenant's rent (*x*), for the grant of a rent-charge, or of a right of common, is within the statute.

But, that a sale of mature potatoes, to be got immediately (*y*) (the contract merely conferring an easement, or right to come upon the land to carry away the potatoes). A contract for all the potatoes growing on certain land, to be dug and carried away by the purchaser, the potatoes alone being the subject matter of the sale (*z*). An agreement by *A.*, the owner of land, that *B.* should cultivate it, yielding to *A.* a moiety of the crops (*a*), a parol contract for an easement, such as a liberty to nail the frame-work of a sky-light against a wall (*b*), or to stack coals in a yard, or use a way over the land of another (*c*), is not within the statute (1).

(*r*) *Ayliff v. Tracy*, 2 P. Wms. 65.

(*s*) *Walker v. Constable*, 2 Esp. C. 659. 1 B. & P. 306. *Stansfield v. Johnson*, 1 Esp. C. 102. [*Catlin v. Jackson*, 8 Johns. 520, a sheriff's sale of lands. 2 Johns. 248. S. C.]

(*t*) *Crosby v. Wadsworth*, 6 East, 602.

(*u*) *Emmerson v. Heelis*, 2 Taunt. 38. But *qu.* and *vide* *Warwick v. Bruce*, 2 M. & S. 205. And see also *Waddington v. Bristow*, 2 B. & P. 453. *supra* 78, n. (*s*). and 2 B. & B. 99.

(*v*) *Teal v. Auty*, 2 B. & B. 99.

(*x*) *O'Connor v. Spaight*, 1 Scho. & Lef. 306.

(*y*) *Parker v. Staniland*, 11 East, 362.

(*z*) *Warwick v. Bruce*, 2 M. & S. 205.

(*a*) *Poulter v. Killingbeck*, 1 B. & P. 397. And an appraisment of the value having been made for both parties, it was held that *A.* might recover for goods sold and delivered.

(*b*) *Winter v. Brockwell*, 8 East, 310, n. 11 East, 366.

(*c*) *Wood v. Lake*, Say. 3. *Webb v. Paternoster*, Palm. 71. S. C. 2 Rol. Rep. 143.

(1) [A contract for the sale of things annexed to the freehold, but

A parol agreement that an arbitrator shall determine between the parties, whether a lease shall be granted, is

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which are capable of separation without violence, and by the terms of the contract are to be separated, is held, in Connecticut, not to be within the statute. *Bostwick v. Leach*, 3 Day, 476. Nor is an agreement not to exercise a right regarding the freehold—as not to use a mill, or not to carry on a trade within a particular shop;*ibid.* In New-York the sale of a growing crop of wheat, by parol, is held not to be within the statute. *Newcomb & al. v. Ramer*, 4 Johns. 421, note.

Interest in
lands.

A parol promise by the owner of lands, to a person who had entered into possession without title and made improvements, to sell them to him, is void. *Freer v. Hardenburgh*, 5 Johns. 272. But a promise to pay for the improvements made on one's land is not within the statute. *ibid.* *Benedict v. Bebee*, 11 Johns. 145. Possession is an interest in land, within the meaning of the statute. *Howard v. Easton*, 7 Johns. 205. See also *Fox v. Longley*, 1 Marsh. 388. So is a right in equity of redeeming mortgaged lands. *Scott & al. v. McFarland*, 13 Mass. Rep. 309: And a contract to release a covenant of warranty annexed to land. *Bliss & al. v. Thompson*, 4 Mass. Rep. 488: And a promise by a grantee to execute a deed of defeasance, so that the conveyance shall operate as a mortgage. *Boyd v. Stone*, 11 Mass. Rep. 342: And a promise by the grantee to return the deed unrecorded, if the contract is rescinded, or if certain conditions are performed by the grantor. *Sherburne v. Fuller*, 5 Mass. Rep. 133. Any permanent right to hold another's lands for a particular purpose, and to enter on them at all times, without his consent, is an interest within the statute. *Cook v. Stearns*, 11 Mass. Rep. 533: Thus an easement in the lands of another, or a right to enter on them for the purpose of erecting and keeping in repair a dam, embankment or canal, in order to raise water to work a mill, cannot be acquired by parol. *ibid.* See also *Phillips v. Thompson*, 1 Johns. Chan. Rep. 131. S. P. But where there is a parol agreement for a right of way, or other interest in land, and any acts are done in pursuance thereof, which are prejudicial to the party performing them, and are in part execution of the contract, the agreement is valid notwithstanding the statute. *Ricker & al. v. Kelly & al.* 1 Greenleaf, 117. An agreement, after the execution of a lease, that the lessee shall not use the pasture land without paying for it, is within the statute. *Tryon v. Mooney*, 9 Johns. 583. So is an agreement between A. and B. that B. shall purchase C.'s lands for the benefit of both; though B. makes the purchase, and thereupon it is further agreed that A. shall advance half the purchase money and be equally interested in the purchase. *Parker v. Bodley*, 4 Bibb, 102. S. P. *Henderson v. Hudson*, 1 Munf. 510.

A parol agreement between owners of adjoining lands, that a surveyor should run a dividing line between them, and that it should thus be ascertained and settled—which was executed, and the line run accordingly, and marked on a plat by a surveyor in their presence, as the boundary—was held to be conclusive, and not within the statute. *Boyd's Lessee v. Graves & al.*, 4 Wheat. 513. See *Jackson v. Dysling*, 2 Caines' Rep. 198. *Stuyvesant v. Dunham & al.*, 9 Johns. 61. *Whitney v. Holmes*, 15 Mass. Rep. 151.

An agreement to remove a fence and open a road, is not an agreement concerning an interest in lands. *Storms v. Snyder*, 10 Johns. 109. Assumpsit may be maintained by grantor against grantee for the consideration of a conveyance, if not in fact paid, although pay-

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lands.

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within the statute (*d*). It seems to be now settled that an equitable mortgage, by the deposit of title deeds, is not within the statute (*e*).

* It has frequently been held in equity, that a part performance takes the case out of the statute (*f*). Where

(*d*) *Walters v. Morgan*, 2 Cox's Chan. Ca. 369.

(*e*) *Russel v. Russel*, 1 Bro. Ch. 269. This is a matter of daily occurrence. 11 Ves. 403. 404, n. 12 Ves. 197. 1 Evans's St. 235. [See Coote on Mortgages, chap. VIII. 19 Ves. 211. 258. 2 V. & B. 83.]

(*f*) *Griffith v. Young*, 12 East, 513. *Crosby v. Wadsworth*, 6 East, 602. *Ld. Aylesford's case*, Str. 783. And this, it has been said, is on the ground of fraud. 1 Bro. C. C. 413. 417. 1 Ves. 221. Buller, J. (in *Brodie v. Paul*, 1 Ves. jun. 333), intimated an opinion that the same rule prevailed at law as in equity on this subject; but a contrary opinion was expressed by *Ld. Eldon*, in *Cooth v. Jackson*, 6 Ves. 29. See *Teal v. Auty*, 2 B. & B. 99, where the contract was for growing trees, which the defendant (the vendee) cut down and took away; and held that he might recover, the agreement being executed. See also *supra*, 125.

ment is acknowledged in the deed—it not being a contract within the statute. *Bower v. Bell*, 20 Johns. 338. *Wilkinson v. Scott*, 17 Mass. Rep. 249. An agreement to abate in the price what the land is deficient in the quantity expressed in the deed, is not within the statute. *Mott v. Hurd*, 1 Root, 73. See vide *Bradley v. Blodget*, Kirby, 23. The terms “lands, tenements and hereditaments,” in the statute of frauds, in Tennessee, do not comprehend an equitable estate: Sales of occupant claims are therefore not within the statute. *Danforth v. Lowry*, 1 Hayw. Tenn. Rep. 61.

Under the act of Pennsylvania “for the prevention of frauds, &c.,” an action for damages may be maintained on a parol agreement for the sale of land. *Ewing v. Tees*, 1 Binney, 450. The act, though it does not make such parol agreement void, restricts its operation as to the acquisition of an interest in the land, and no title in fee simple can be derived under it. *Bell v. Andrews*, 4 Dallas, 152. Where such parol agreement has been executed by payment of a valuable consideration, and delivery of possession, it is binding between the parties. *Billington v. Welsh*, 5 Binney, 131: But to bind a subsequent *bona fide* purchaser, notice either in fact or law must be clearly shown. *ibid.* There is nothing in the act to prevent a declaration of trust by parol. *German v. Gabbald*, 3 Binney, 302. In Kentucky, the statute of frauds is held to be imperative against all parol contracts for lands where the trust is direct, but not to extend to resulting trusts, which will be decreed, though proved by parol alone. *Fischli v. Dumaresly*, 3 Marsh. 23. The statute withholds the remedy for enforcing a parol contract for lands, but does not destroy its obligation—and it is a good defence to a bill for specific performance of a written contract, that it has been rescinded, or its terms abated, by a subsequent parol agreement. *Lucas v. Mitchell*, 3 Marsh. 245.

In New York and Pennsylvania, if a person purchase land with another's money and take a deed of it in his own name, there is a resulting trust in favour of him to whom the money belonged—and

the tenant agreed to pay the landlord 40*l.* out of 100*l.*, for the good-will of the farm if he would receive another tenant, it was held, that the defendant having received the 100*l.* was liable at law (*g*); so where the plaintiff let land in consideration of receiving half the crop, and the crop was appraised by mutual consent, it was held (*h*) that the statute was out of the question; so in equity, where the party has been put into possession (*i*), especially if he has incurred expense (*k*); or a man, upon promise of a lease, has laid out money in improvements (*l*), or a lessee enters and builds (*m*); but the permitting one already in possession to continue in possession is no part-performance of an agreement for a further lease (*n*). Where the bill stated it to be a part of the agreement that the contract should be reduced into writing, and in consequence of the agreement, the party was put to expense, it was held that * the bill would lie for the sum laid out, and an action at * 601 law was directed, and also that the agreement should be admitted (*o*). Where the act would not prejudice the party, in case the agreement were not to be enforced, it is not to be considered as a part-performance (*p*) (1) So where

Interest in
lands, &c.

(*g*) *Griffith v. Young*, 12 Erst, 513.

(*h*) *Poulter v. Killingbeck*, 1 B. & P. 397. And see 6 East, 612.

(*i*) *Pyke v. Williams*, 2 Vern. 455.

(*k*) 9 Mod. 37. 2 Freem. 281. *Foxcroft v. Lister*, cited 2 Vern. 456. *Floyd v. Buckland*, 2 Freem. 269.

(*l*) 1 Vern. 151. Prec. Ch. 561.

(*m*) 9 Mod. 37.

(*n*) *Smith v. Turner*, cited Prec. in Ch. 561.

(*o*) 1 Vern. 159.

(*p*) *Gunter v. Halsey*, Amb. 586.

such trust may be proved by parol. *Jackson v. Sternbergh*, 1 Johns. Cas. 153. S. C. 1 Johns. Rep. 45, n. *Foote v. Colvin*, 3 Johns. 215. *Jackson v. Matsdorf*, 11 Johns. 91.—Wharton's Digest, 580, cites manuscript cases in the Circuit Court of the U. States. *Secus*, in Massachusetts. *Goodwin v. Hubbard & al.* 15 Mass. Rep. 218. *Runey & al. v. Edmands*, ibid. 294. *Storer v. Batson*, 8 Mass. Rep. 431. *Jenney v. Alden*, 12 Mass. Rep. 375.]

(1) [*Davenport v. Mason*, 15 Mass. Rep. 85. S. P.—Where possession of land has been taken, and improvements made under an agreement, the terms of which do not distinctly appear, though the court will not grant relief on the ground of part performance, yet the bill will be retained for the purpose of affording the party a reasonable compensation for beneficial and lasting improvements. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. Consideration-money paid, possession taken, and valuable improvements made, under a parol contract for the conveyance of lands, will, in equity,

PART the act has been done with another view, and not with an
IV. intention to carry the agreement into effect (*q*) ; or where
 it is merely ancillary to the contract (*r*). An estate was
 sold at twenty-five years purchase, the tithes and timber to
 be taken at a valuation : it was held, that the making the
 valuation and sending the abstract did not amount to a
 part-performance (*s*). The receipt of earnest will not take

(*q*) Ibid.

(*r*) *Whitchurch v. Bevis*, 2 Bro. C. C. 559.

(*s*) *Whitbread v. Brookhurst*, 1 Bro. C. C. 404.

take the case out of the statute, and entitle the complainant to a decree for a specific performance. *Downey v. Hotchkiss*, 2 Day, 225. *Smith v. Lessee of Patton*, 1 Serg. & Rawle, 80. *Wetmore v. White*, 2 Caines' Cas. in Er. 87. But, at law, part performance will not take a parol agreement out of the statute. Per Kent, C. J. *Jackson v. Pierce*, 2 Johns. 221. *Kidder v. Hunt*, 1 Pick. 328. Expenses incurred in faith of a parol agreement, which is violated, may, however, be recovered in an action of indebitatus assumpsit. 1 Pick. *ubi sup.* And in equity, a part performance, which will take a case out of the statute, must be made under such circumstances as amount to a fraud. *Meach v. Stone & al.* 1 Chipman's Rep. 182. Payment of the purchase money, it seems, is not sufficient part performance to take a case out of the statute. *Jackson's Assignees v. Cutright & al.* 5 Munf. 308.

The part performance which will, in equity, take a case out of the statute, must be of the identical agreement set up by the bill. *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131. And it must be such as usually or necessarily follows such an agreement. *Townsend v. Sharp*, 2 Overton's Rep. 192.

A parol promise to convey lands to a son, in consideration of natural affection merely, will not be specifically enforced in equity against the father, even in favour of a purchaser from the son. *Hickman v. Grimes*, 1 Marsh. 86. Nor will a parol promise, alleged to have been made by an ancestor, be enforced against an infant heir, although his guardian does not insist on the statute. *Grant v. Craigmiles*, 1 Bibb, 203.

A court of equity will not compel specific performance of a parol agreement to convey lands, in a case where the party who asks its assistance is chargeable with unfair conduct in relation to the contract which he seeks to enforce—but will leave him to his legal remedy. Per Washington, J. *Thompson v. Tod*, 1 Peters' Rep. 385. If part of the purchase money be paid, and possession be delivered in pursuance of and with a view to the performance of a parol agreement, it is held in Pennsylvania, that the case is taken out of the statute. *Bassler v. Niesly*, 2 Serg. & Rawle, 355. *S. P. Jones v. Peterman*, 3 ib. 546. But where the lessee, in a parol lease for seven years, had possession before the agreement, and continued in possession afterwards, and had made no improvements, nor incurred expenses on the faith of the agreement, it was held that possession could not be regarded as a part performance. *Jones v. Peterman*, *ubi sup.* The cases in England, on the subject of the specific performance of agreements for the sale of lands, are not strictly applicable in this country, on account of the rapid change of the value of lands here. *Todd v. Pfoutz*, 3 Yeates, 177.]

the case out of the statute (*t*). Where *A.* articted for an estate in his own name, and *B.* alleged that the estate had been bought for him, but there was no written agreement or part payment between them, it was held, that *B.* could not prove the fact by parol evidence (*u*).

Upon any agreement that is not to be performed within the space of one year, &c.—It has been held, that cases depending upon contingencies, which may or may not happen within the year, as upon the return of a ship, marriage, or death, the case is not within the statute (*x*), although the event does not in fact happen * within the year (*y*). But * 602 where it appears to be the intention of the parties, that the agreement shall not be performed within the year, the case is within the statute (*z*), although part be performed within the year (*a*) (1).

Unless the agreement, &c.—The term *agreement* comprehends contracting parties, a consideration, and a promise. Hence it is necessary that the names of the contracting parties should be stated (*b*) (2).

(*t*) Prec. in Chan. 560.

(*u*) *Bartlett v. Pickersgill*, 32 & 33 Geo. II. in Chan. cited *R. v. Boston*, 4 East, 577.

(*x*) 1 Salk. 280. Per Wilmot, J., 3 Burr. 1281. *Peter v. Compton*, Skinn. 353. 1 Ld. Raym. 317. [*Moore v. Fox*, 10 Johns. 244.] *Fenton v. Emblers*, 3 Burr. 1278; where, in consideration that the plaintiff would become housekeeper to the defendant's testator, and take upon herself the care and management of his family, the testator undertook to pay her certain wages, and leave her an annuity.

(*y*) Ibid. Ld. Holt was of opinion that the contract could not be refused after the expiration of the year. 1 Ld. Raym. 317.

(*z*) According to the resolution of the Judges, in *Peter v. Compton*, Skinn. 353.

(*a*) *Boydell v. Drummond*, 11 East, 142. *Bracegirdle v. Heald*, 1 B. & A. 722.

(*b*) See the cases below under the 17th section; also *Champion v. Plummer*, 1 N. R. 252. Distinct and separate documents may be united for this purpose.

(1) [An agreement to marry at the end of five years is within the statute. *Derby v. Phelps*, 2 N. Hamp. Rep. 515.]

(2) [A paper purporting to state the "articles of sale of the estate of J. W. deceased," containing terms of payment, and a schedule of the property as divided, with no other description of it than "mansion house in D. street—Lot No. 1—No. 2." &c. and the names of the purchasers, and the sums stipulated to be given, carried out against each lot, &c. and the signature of the auctioneer affixed, and a memorandum beneath it, signed by the bidder, in which he engaged to take the property bidden off by him at the

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IV.

Agreement.

The *consideration*.—A *promise* in writing to pay the debt of another, without specifying the consideration, for the promise, has been held to be insufficient (c) (1).

* 603 Where the defendant wrote a letter to the mortgagee of premises, stating that he had agreed to dispose of them, it was held to be insufficient, since it did not specify the terms of sale, or the sums or number of houses (d). So an agreement for a lease at a certain * rent, which did not specify the term (e), was held to be insufficient. But it is sufficient if the consideration appear by necessary inference and implication (f). A letter written by the defendant to the plaintiff's attorney, requesting the plaintiff to give indulgence to a third person, till a future day, when he (the defendant) would see the plaintiff paid, was held to be sufficient, although it did not specify

(c) *Wain v. Warlters*, 5 East, 10. The promise in that case was thus, "I will engage to pay you (the plaintiff) by half past four this day, fifty-six pounds and expenses, or bill to that amount on Hall, J. W." The consideration was the forbearance to sue Hall. See *Egerton v. Matthews*, 6 East, 307. *Stadt v. Lill*, 9 East, 348. As to the case of *Wain v. Warlters*, which has excited so much legal discussion, see *Ld. Eldon's observations, Ex parte Minet*, 14 Ves. 159. *Ex parte Gordon*, 15 Ves. 286. [In *Saunders v. Wakefield*, 4 B. & A. 595, the doctrine of *Wain v. Warlters* was unanimously recognized and confirmed by the court of King's Bench.]

(d) *Seagood v. Meale*, Pr. Ch. 560. 9 Ves. 250. 252. 11 Ves. 555.

(e) *Clinan v. Cooke*, 1 Scho. & Lef. 22.

(f) Per Lawrence, J. 6 East, 308.

prices and credits mentioned—was held not to be a sufficient memorandum within the statute, as it did not show who were the *two parties* to the contract. *Sherburne & al. v. Shaw*, 1 N. Hamp. Rep. 157.]

(1) [Under the statute of Virginia which provides that "*the promise or agreement shall be in writing*," the consideration need not be in writing. *Violett v. Patton*, 5 Cranch, 142. In New York and South Carolina, the English doctrine is adopted. *Sears v. Brink & al.* 3 Johns. 210. *Leonard v. Vredenburg*, 8 ib. 29—*Stephens v. Winn*, 2 Nott & M'Cord, 372. n. It is also explicitly recognized, though not directly adjudicated, in New Hampshire. *Nelson v. Sanborne*, 2 N. Hamp. Rep. 414. But in Massachusetts, it is rejected. *Packard v. Richardson & al.* 17 Mass. Rep. 122.

Where the agreement is by covenant or writing under seal, no consideration need be expressed, for the seal itself imports a consideration; and the statute has not altered the common law in this respect. *Livingston v. Tremper*, 4 Johns. 416. See also *Aikin v. Duren*, 2 Nott & M'Cord, 370. In *Adams v. Bean*, 12 Mass. Rep. 137, it was held that a written engagement, on the back of a lease, that the lessee should pay the rent, sufficiently imports a consideration, though it is not expressed.]

the sum, which was allowed to be proved by parol evidence (g).

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IV.

A guarantee in writing, to pay for goods to be delivered by the vendor to a third person, sufficiently expresses the consideration (h) (1). Agreement.

So a memorandum, signed by the defendant, by which he agrees to give so much for goods, is sufficient, for the consideration is to be inferred from the agreement, viz. the sale and delivery of goods (i).

(g) *Bateman v. Phillips*, 15 East, 270. The letter was addressed to the plaintiff's attorney, and ran thus, "The bearer *D. W.* has a sum of money to receive from a client of mine some day this next week; I trust that you will give him indulgence till that day, when I undertake to see you paid."

(h) *Stadt v. Lill*, 9 East, 348. 6 Esp. C. 89, *Warrington v. Furber*.

(i) *Egerton v. Mathews*, 6 East, 307. Note, this was on the construction of the 17th sec.

(1) [A memorandum of the sale of lands must, besides being signed by the party, contain the essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273. A receipt for money, stating that it was the cash part of the purchase of a lot bought of the person subscribing the receipt, is not sufficient to take a case out of the statute. *Ellis v. Deadman*, 4 Bibb, 466. A receipt in these words—"Received of A. \$20, on account of a plantation on the *Cypress*, sold to him this day for \$2,200, payable in different instalments, as per agreement. Charleston, Aug. 1. 1816," and signed by the vendor, was held sufficient to take the case out of the statute. *Cosack v. Descoudres*, 1 M'Cord, 425. Where a contract for the purchase of land is executory, the price must be stated in the written memorandum: *Secus*, where the contract is executed by the payment of the purchase money, and the payment is admitted in the memorandum. *Fugate v. Hansford*, 3 Littell's Rep. 262.

Where a bill charged that the defendant agreed by parol to bid in land for the complainant, at a sheriff's sale, though he took the title in his own name, and the defendant pleaded the statute in bar; it was held that an account signed and delivered by the defendant, in which he charged the complainant with the consideration money for the purchase of the land, was a sufficient memorandum or note in writing to take the case out of the statute. *Denton v. McKensie*, 1 Desauss. 289.

A written agreement in these words, "I promise to pay the amount aforesaid, if C. S. should not pay it in six months," is a sufficient promise within the statute. *Buckley v. Beardsley*, 2 Southard's Rep. 570. So is the following—written by C. on a note given by A. to B.—"I guarantee the payment of the within note to B., one half in six months, the other half within twelve months." *Neelson v. Sanborne*, 2 N. Hamp. Rep. 413. See post, p. 606, note (1).]

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IV.

Note or memorandum.

* 604

Or some memorandum, or note thereof.—Under this section, as well as the 17th, the terms of the contract may be collected from several distinct papers, provided they be connected by reference from one to another; but it is not sufficient to connect them by mere extrinsic oral testimony (*k*). Thus, an agreement for a lease, which does not specify any definite term, and which has no reference to an advertisement which does express the term, cannot be connected * with it by oral evidence (*l*); and a letter, referring to some agreement generally, but without specifying the terms of it, is not sufficient (*m*). Thus a reference in an agreement to such parts of another paper as have been read to the party, is insufficient (*n*) (1).

And it is not essential that a note or memorandum of the agreement should have been delivered to the other party. A letter written by a man to his own agent, setting forth the terms of the agreement, has been held to be sufficient (*o*). So where the father wrote a letter to a friend of the plaintiff's, agreeing to give 500*l.* to his daughter on her marriage, to be charged upon his land (*p*); but where the father wrote a letter to the daughter, after an agreement with the intended husband, in which he stated his agreement to leave her 3,000*l.* and that the matter was to be fully concluded the next day, was held to be a mere

(*k*) *Tawney v. Crowther*, 1 Bro. Ch. C. 161. 318; and *vid. infra*, 612. [*Lent & al. v. Padelford*, 10 Mass. Rep. 230.]

(*l*) *Clinan v. Cooke*, Sch. & Lef. 22. Evans on the Stat. Vol. I. p. 237. *Seagood v. Meale*, Prec. in Chan. 560. *Clerk v. Wright*, 1 Atk. 12. *Whaley v. Bagenal*, 1 Bro. P. C. 345.

(*m*) *Ibid.* 1 Ves. jun. 326.

(*n*) *Brodie v. St. Paul*, 1 Ves. jun. 326; and Evans on the Stat. Vol. I. p. 237, where the cases on this subject are collected.

(*o*) Per Ld. Hardwicke, 3 Atk. 503. 2 Ch. Rep. 147. 1 Vern. 110.

(*p*) *Moore v. Hart*, 2 Ch. R. 284. 1 Vern. 110.

(*q*) *Ayliffe v. Tracy*, 2 P. Wms. 65.

(1) [See *Parkhurst v. Van Cortlandt*, cited in the preceding note. In order to make a letter evidence of an agreement for the sale of lands, so as to take it out of the statute, it ought distinctly to set forth the terms of the agreement, or at least refer to some written instrument, in which the terms are set forth, and that the party accepted such terms.—Therefore a letter from the vendor to the vendee, informing him that the writings for the land were ready, and adding that “the sooner he came and settled the business, the better”—was held not to be sufficient. *Givens v. Calder*, 2 Desauss. 188. It has, however, been decided in Virginia, that a letter promising to make a deed of land, “according to contract,” is a sufficient memorandum or note in writing, within the statute, though the terms of such contract are not mentioned. *Johnson v. Ronald's Adm'r.* 4 Munf. 77.]

communication, and not binding, the husband having married the daughter in ignorance of the letter (1).

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IV.

A proposal, by letter, when acceded to by parol, is sufficient (*r*), although it be afterwards retracted and again agreed to by parol (*s*).

Note or memorandum.

* Where the defendant had written letters to different people, in which he stated that he had agreed to sell an estate to the plaintiff at twenty-one years purchase, upon a bill filed for a specific performance, the plea of the statute was allowed (*t*); and, in general, a mere written statement of the party to be bound, of the terms of an agreement, will not be sufficient, unless it be either regularly signed as an agreement, or unless it appear that the party considered the agreement as complete. Thus, the writing instructions for a deed, unless the party subscribe or insert his name, so as to give authenticity to the document, is not binding (*u*). So where the counsel for a lady took down in writing a minute of the father's and intended husband's proposals for a settlement, and gave them to a clerk to prepare the deeds, and before they were drawn the father died, a bill for specific performance was dismissed, since there was no act of the party to indicate that he considered the agreement to be complete, and the neglect to sign it formally was evidence to show that it was left open to further consideration (*x*).

* 605

So general instructions for an agreement to be afterwards executed are not binding (*y*).

Signed by the party.—A signature by the party as a witness to a deed which contains the agreement, or which refers to it, is a sufficient signature within the statute (*z*); but it is essential to prove that the witness knew that the instrument contained the agreement, or referred to it (*a*).

Signature.

(*r*) *Coleman v. Upcot*, 5 Vin. Ab. 527.

(*s*) *Bird v. Bloss*, 2 Vent. 361. It has been said, that a proposal by letter, at first refused, but afterwards assented to, is binding. *Hodgson v. Hutchinson*, 5 Vin. Ab. 522; but see observations, 1 Evans's Stat. p. 236, n. 13.

(*t*) *Whaley v. Baganal*, 6 Bro. C. C. 45. Qu. on what ground?

(*u*) *Stokes v. Moore*, 1 Cox's P. Will. 771, n.

(*x*) *Bawdes v. Amherst*, Prec. Ch. 402. But see 3 Atk. 503.

(*y*) 2 Bro. C. C. 569.

(*z*) 1 Wils. 118. 1 Ves. 6. 3 Atk. 502.

(*a*) *Ibid.* Per *Ld. Hardwicke*; and see the observations of *Sir D. Evans*. Evans on the Stat. Vol. I. p. 236.

(1) [See *Barrell & al. v. Joy*, 16 Mass. Rep. 221, and *Steere v. Steere*, 5 Johns. Ch. Rep. 11, as to proving a trust by letters not directed to the party, but to third persons.]

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IV.

* 606
Signature.

An agreement for the sale of a house, beginning, "I A. B., &c." in the hand-writing of the vendor, but signed by the vendee only, is sufficient to bind * the vendor (a). It is immaterial in what part of the instrument the signature is contained (b), whether at the beginning or end. The perusing and altering the draft of an intended lease is not a sufficient signature (c). (1)

It is not essential that the signature should be upon the agreement itself, it is sufficient if it be indorsed on the draft of a lease, as a notification of the assent of the party to the terms of the lease, or if it be written in a letter or a memorandum which refers to the agreement (d).

By party to be charged.

Signed by the party to be charged.—It is sufficient if the agreement be signed by the party charged by it in the particular action, although it has not been signed by the other contracting party (e), (2) for the writing is not the contract,

(a) *Knight v. Crockford*, 1 Esp. C. 189. *Lemayne v. Stanley*, 3 Lev. 1. *Allen v. Bennett*, 3 Taunt. 169. *Welford v. Beaseley*, 1 Wils. 118.

(b) *Ogilvie v. Foljambe*, 3 Merivale, 62. *Selby v. Selby*, Ib. 6. *Knight v. Crockford*, 1 Esp. C. 189. *Right d. Cater v. Price*, Dougl. 241. But qu. whether the mere mention of the name of the defendant in the body of the testament, although it be drawn by himself, be sufficient. See *Stokes v. Moore*, 1 P. Wms. 770. n.; 1 Cox's Cases, 222.

(c) *Hawkins v. Holmes*, 1 P. Wms. 770.

(d) *Shippey v. Derrison*, 5 Esp. C. 191, [and Mr. Day's note.] *Blagden v. Bradbear*, 12 Ves. 466.

(e) 3 Bro. C. C. 161. 318. 1 Str. 236. 1 P. Wms. 618. *Hutton v. Gray*, 2 Ch. C. 164. *Seton v. Slade*, 7 Ves. 265. See also, *Martin v. Mitchell*, 2 J. & W. 426; see 12 Ves. 107; *Weston v. Russell*, 3 V. & B. 192. [2 Ball & Beatty, 370.] *Semble contra, Lawrenson v. Butler*, 1 Scho. & Lef. 20.

(1) [Where A. wrote his name upon the back of a note made by B. payable to C. and authorized D. to write over the name a stipulation to guaranty the payment of the note; it was held that the signature, and the stipulation written pursuant to the authority, were a memorandum signed by the party, within the statute, and that this authority might be proved by parol. *Ulen v. Kittredge*, 7 Mass. Rep. 233. But a contrary decision was made where A. gave a note to B. and afterwards, in order to obtain further time, agreed to procure C. to guaranty the payment of it, and C. put his name on the note, in blank, and said he was held, and B. afterwards wrote a guaranty over C.'s name, without an express authority. *Hodgkins v. Bond*, 1 N. Hamp. Rep. 284. This last decision, however, was not made on a distinction between an express and an implied authority to write a guaranty over the defendant's name.

See *Joselyn v. Ames*, 3 Mass. Rep. 274. *Hunt v. Adams*, 5 ib. 358. 6 ib. 519. *White v. Howland*, 9 ib. 314. *Moies v. Bird*, 11 ib. 436.]

(2) [*Ballard v. Walker*, 3 Johns. Cas. 60. acc.]

but merely evidence of it (*f*). The decisions on the corresponding clause in the 7th section are applicable to this clause (*g*).

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Or some other person thereunto by him lawfully authorized.—Proof of an oral authority is sufficient (*h*). An auctioneer is the agent of the vendor under this section, as he is under the 17th; and his receipt for the deposit will be a sufficient memorandum of the contract, provided that it sufficiently express the terms, or virtually * include them, by reference to other documents (*i*). It has been held that he is not an agent whose signature will bind the vendee (*k*), but this opinion seems to have been completely overruled in the subsequent cases of *Emerson v. Heelis* (*l*), and *White v. Proctor* (*m*), which are consistent with the decisions upon the corresponding clause in the 17th section (*1*).

Or other person lawfully authorized.

* 607

Where, upon an agreement to sell a house for an annuity, both parties instructed one attorney, who made minutes of his instructions, as follows, "Mr. B. agrees to convey the house in consideration of a rent of 40*l.* per annum; Mr. W. to take the stock at a fair appraisement;" a bill filed by W. for a specific performance was dismissed (*o*).

By agent.

The clerk of an agent has not, in general, an authority to sign for the principal, although it may be sufficient in

(*f*) See Evans on the Stat. Vol. I. p. 236.

(*g*) *Infra*, 613.

(*h*) *Coles v. Trecothick*, 9 Ves. 234. 250. *Clinan v. Cooke*, 1 Sch. & Lef. 22. [*Talbot v. Bowen*, 1 Marsh. (Kentucky) Rep. 436.] *Aliter*, under the 1st and 3d sections.

(*i*) 7 East, 569. *Blagden v. Bradbear*, 12 Ves. 471.

(*k*) *Stansfield v. Johnson*, 1 Esp. C. 102. See Ld. Eldon's observation in *Coles v. Trecothick*, 9 Ves. 234; those of Sir W. Grant, *Buckmaster v. Harrop*, 7 Ves. 341, and *Higginson v. Clowes*, 15 Ves. 516; and of Ld. Erskine, 13 Ves. 456.

(*l*) 2 Taunt. 38. See the observations of Mansfield, C. J. in this case.

(*m*) 4 Taunt. 209. [*M'Comb v. Wright*, 4 Johns. Ch. Rep. 659. *Davis v. Robertson*, 1 Rep. Con. Ct. 71.]

(*o*) *Whitchurch v. Bevis*, 2 Bro. C. C. 559.

(1) [At a sale of land under an order of a court of equity, the commissioner is the agent of both parties, and his entry in the sale-book is a sufficient memorandum within the statute. *Jenkins v. Hogg*, 2 Const. Rep. 821. An entry in the books of trustees of a town, of a sale of lots by auction, does not take the case out of the statute, unless signed by the trustees or some person for them. *Thomas v. Trustees, &c.* 3 Marsh. 299. See *Sherburne & al. v. Shaw*, 1 N. Hamp. Rep. 157, cited *ante*, p. 602, note.]

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particular cases where the principal has assented (*p*). Where trustees were authorized to sell at the request of *A. B.*, it was held, that their general consent did not constitute *A. B.* their agent, so as to enable him to make a contract (*q*).

Sec. 17.

* 608

Sec. 17 (*r*).—No contract for the sale of any *goods, wares and merchandises*, for the price of 10*l.* or upwards, shall be good, except the buyer shall *accept part* of the goods so sold, and *actually receive* the same, or give something in *earnest* to bind the bargain, or in part of * payment, or that *some note or memorandum* in writing of the said bargain be made and signed by the *parties to be charged* by such contract or their *agents* thereunto lawfully authorized. (1)

Goods, wares,
&c.

For the Sale of any Goods, Wares and Merchandises—It seems that a sale of stock is within the statute, although this has been doubted; since there can be no actual delivery or acceptance of the goods; and in one instance all the Judges were divided in opinion upon this point (*t*); but in two subsequent cases in equity the Court expressed an opinion such a sale was within the statute, and said that it has been so determined in other cases (*u*). In the case of *Simon v. Motivos*, Lord Mansfield, and Willes and Yates, Js, expressed a doubt whether sales by *auction* were within the statute, on account of the great publicity with which such sales are attended (*x*). The words of the statute, however, are so plain and so general, that it may be worthy of great consideration, whether the courts would be warranted in over-ruling its application to sales by auction, on the ground, not that there is no danger of perjury, but because there may (and that is contingent) be less in such cases than in most others. The same reasons would apply with equal force to many other cases, such as sales in markets and fairs. It is also to be observed, that sales by auction of lands have been held to be within the 4th section of the

Sales by auc-
tion.

(*p*) *Coles v. Trecothick*, 9 Ves. 234. 250.

(*q*) *Mortlock v. Buller*, 10 Ves. 292.

(*r*) For the decisions under the 5th section as to *wills*, see the title WILL.

(*t*) *Pickering v. Appleby*, Com. Rep. 354, cited 2 P. Wms. 308.

(*u*) Prec. Chan. 533; and see Sel. Cas. in Chan. 41.

(*x*) In *Simon v. Motivos*, 1 Bl. Rep. 599. But the case was not decided upon that ground.

(1) [See 4 Wheat. 89. note, where the decisions on this section of the statute are collected.]

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same act (*y*). Where the thing contracted for does not exist at the time of the contract, but is to be so constituted by the application of subsequent labour, * and is consequently incapable of delivery or acceptance at the time of agreement, the contract is not within this section of the statute, although the materials to be employed do exist at the time of contract. Thus a contract for a chariot to be made (*z*), or for the purchase of a quantity of oak pins, to be cut out of slabs and delivered to the buyer (*a*); or for a quantity of corn to be thrashed out (*b*), is not within the Statute. But it extends to the sale of things which exist *in solido* at the time of the sale, although the contract be but executory (*c*), and although the goods are to be subsequently delivered at a different place (*d*).

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&c.

Shall accept part of the goods so sold, and actually receive the same.—Where the goods are ponderous a constructive delivery is sufficient; as where the vendor delivers to the vendee the key of the place where the goods are deposited (*e*); or the muniments of a ship; or the vendee comes the next day and sees the goods weighed off (*f*); or sells part of the commodity sold to another, who removes it (*g*). If a party having purchased goods at an auction write his name upon a particular article (*h*), it will be an acceptance as to that article, but * not as to any other article, distinctly purchased at a separate price, but at the same time; so

Part for acceptance.

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(*y*) See *Ld. Ellenborough's* observations upon this point, in *Hinde v. Whitehouse*, 7 East, 558; and see *Heyman v. Neale*, 2 Camp. 337. 12 Ves. jun. 466.

(*z*) *Towers v. Osborne*, 1 Str. 506.

(*a*) *Groves v. Buck*, 3 M. & S. 178.

(*b*) *Clayton v. Andrews*, 4 Burr. 2101.

(*c*) *Alexander v. Comber*, 1 H. B. 20. *Rondeau v. Wyatt*, 2 H. B. 63. *Cooper v. Elston*, 7 T. R. 14: [*Bennett v. Hull*, 10 Johns. 364.] Although the principle has in previous cases been laid down to that extent. See Str. 506. 2 Burr. 2101.

(*d*) *Cooper v. Elston*, 7 T. R. 14. [*Newman v. Morris*, 4 Har. & M'Hen. 421.]

(*e*) *Searle v. Keeves*, 2 Esp. C. 598. *Pickering v. Appleby*, Com. Rep. 354. *Colt v. Nettervill*, 2 P. Wms. 308. [*Wilkes v. Ferxis*, 5 Johns. 335. *Hunn & al. v. Bowne*, 2 Caines's Rep. 44. *Leedom v. Phillips*, 1 Yeates, 529.]

(*f*) *Simon v. Motivos*, 3 Burr. 1921, 1 Bl. Rep. 598.

(*g*) *Chaplin v. Rogers*, 1 East, 192.

(*h*) *Hodgson v. Le Bret*, 1 Camp. 233. *Anderson v. Scott*, n. ibid. In the latter case, the plaintiff having selected several pipes of wine in the defendant's cellar, and agreed for the purchase, cut off the spills or pegs by which the wine is tasted, and the defendant's clerk marked the plaintiff's initials on the casks.

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Sec. 17.
Proof of ac-
ceptance.

if the purchaser of two horses desires the vendee to keep them in his possession at livery, and the vendee in consequence removes them from one stable into another (i); for the vendor is, for the purpose of such delivery, the agent of the vendee.

A delivery of part of the goods takes the case out of the statute; as, where the vendee, having purchased a quantity of balsam of Peru for 200*l.* sent an agent with baskets for part of it, which was delivered (k). And if the purchaser take a sample, which is to be considered as part of the commodity contracted for, and not as a mere specimen, it is a part-acceptance within the statute (l).

Where goods were ordered by parol at 11*s.* per pound, and were sent to the vendee, who opened the bale, but sent them back with a letter, alleging that they were not worth 6*s.* per pound, it was held to be no acceptance (m). Whether there has been an acceptance or not by the vendee, is in many instances a question of fact for the Jury; the sale by the vendee of part of the commodity sold is evidence of an acceptance for their consideration (n).

A delivery to an agent appointed by the vendee, as for instance, a carrier, has been held to be an acceptance within the statute; although by requiring an acceptance of the goods, as well as an actual receipt of them, the Legislature seems to have intended some actual assent by the principal beyond that constructive

* 611 * assent which may be inferred from mere delivery to an agent (o). But in later cases this doctrine has been overruled; and the rule is, that so long as the buyer continues to have a right to object either to the quantum or quality of the goods, there can be no acceptance of the goods (p);

(i) *Elmore v. Stone*, 1 Taunt. 458. See *Tempest v. Fitzgerald*, 3 B. & A. 680; and *infra* tit. *Vendor and Vendee*, [and remarks of Bayley, J. 3 B. & A. 324.]

(k) *Descard v. Bond*, Cor. Ld. Hardwicke, 7 Geo. II. MS. 100.

(l) *Hinde v. Whitehouse*, 7 East, 558. *Klinitz v. Surry*, 5 Esp. C. 267.

(m) *Kent v. Huskinson*, 3 B. & P. 233.

(n) *Chaplin v. Rogers*, 1 East, 192.

(o) *Hart v. Sattley*, 3 Camp. 528, where it was held at Nisi Prius that a delivery on a parol order to a carrier who had been in the habit of carrying goods from the vendor to the vendee, was a delivery to the vendee. See also *Dutton v. Solomonson*, 3 B. & P. 583; *Dawes v. Peck*, 8 T. R. 330, [and Mr. Howe's note to *Hart v. Sattley*.]

(p) *Howe v. Palmer*, 3 B. & A. 321; *Hanson v. Armitage*, 5 B. & A. 557.

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and that so long as the seller retains a lien on the goods there can be no receiving of them within the statute by the vendee (*q*). A dealer in London, in the habit of delivering goods at a wharf in London, delivered a parcel at the wharf on a parol order, and the goods having been lost, it was held that the vendee could not recover (*r*). Again, where a verbal order was given to the agent of the vendor for goods, which were to remain in the possession of the vendor till called for, and the agent measured the goods, and set them apart, it was held that there was no acceptance within the statute (*s*).

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of acceptance.

Where the law can pronounce on the facts of the case, whether they constitute an acceptance within the statute, the question is of course a question of law (*t*); but in other cases the question of law may depend upon the conclusion of the Jury, whether there has or not been a delivery and acceptance in point of fact (*u*) (1).

(*q*) *Baldecy v. Parker*, 1 B. & C. 27; *infra*, 1617. *Carter v. Tonsaint*, 5 B. & A. 855; *infra*, 1618. And see *Tempest v. Fitzgerald*, 3 B. & A. 680; *infra*, 1618.

(*r*) *Hanson v. Armitage*, 5 B. & A. 557.

(*s*) *Howe v. Palmer*, 3 B. & A. 321. And see *Astey v. Emery*, 4 M. & S. 262. *Anderson v. Hodgson*, 5 Price, 130.

(*t*) *Vide* Part III. *Law and fact*.

(*u*) *Blenkinsop v. Clayton*, 7 Taunt. 597; *infra*, 1617. Where an article was sold at auction, by the conditions of which the purchaser was to pay 30 per cent. on the price, on being declared the highest bidder, and the residue before the goods were removed, and an article was knocked down to *A.* as the highest bidder, and delivered to him immediately, and after it had remained in his hands for a few minutes; he said he had mistaken the price, and refused to keep it; it was held to be a question of fact for the Jury whether there had been a delivery by the seller, and an acceptance by the buyer, with intent to transfer the right of possession. *Phillips v. Bistoli*, 2 B. & C. 511. In *Chaplin v. Rogers*, 1 East, 194. On an action for goods sold and delivered, the defendant, after a parol purchase of a stack of hay, sold part of it to a third person, by whom it was taken away without the vendor's approbation, it was left by Hotham, B. to the Jury, to say whether there had been an acceptance by the defendant. After a verdict for the plaintiff, on a motion for a new trial, one ground of which was that the Judge had left matter of law as a fact for the Jury, a new trial was refused; and Lord Kenyon and the rest of the Court held that the specific finding by the Jury, that there was an acceptance, put an end to the question of law. But what constitutes an acceptance is frequently a question of law. Thus in *Hinde v. Whitehouse* (7 East, 558), it was held that the accepting of samples of sugar delivered as part of the property purchased at an auction, was a sufficient acceptance in point of law.

(1) [Though a virtual or constructive delivery may be tantamount
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Earnest.

Note or memorandum.

* *Or give something in earnest to bind the bargain, or in part payment.* The putting a shilling into the hand of the servant of the vendor, which is immediately returned, is not sufficient (x).

Some note or memorandum.—It is sufficient if a contract can be collected from several different and separate documents. A bill of parcels, in which the vendor's name is printed, may be connected with a subsequent letter written by the vendor to the vendee (y). So an order for goods, written and signed by the vendor in a book of the vendee's, but not naming the latter, may be connected with a letter written by the vendor to his agent, mentioning the name of the vendee (z); but where the letter, subsequently written by the vendee, recognized the order, but at the same time insisted that the terms of it had not been performed, inasmuch as the goods had not been delivered in time, it was held that it could not establish a previous de-

(x) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(y) *Saunderson v. Jackson*, 2 B. & P. 238; *supra*, 603.

(z) *Allen v. Bennet*, 3 Taunt. 169.

to an actual one, yet the circumstances, which are to be held tantamount, must be so strong and unequivocal as to leave no doubt of the intent of the parties.

An agreement with the vendor about the storage of goods, and the delivery by him of the export entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *indiciu*m of ownership. *Bailey & al. v. Ogden*, 3 Johns. 399. Where the defendant agreed to purchase of the plaintiff a quantity of bagging, after which he was told that it remained in the plaintiff's store, at his risk, whereupon he ordered and had some of it turned out, which he afterwards returned, and then refused to take any part of it—it was held that this was not a sufficient delivery within the statute. *Jackson v. Watts*, 1 M'Cord, 288. If a contract for the sale of goods, to be delivered within a certain time, be within the statute,—a delivery and acceptance of a part of the goods, after the expiration of the stipulated time, will not take the contract out of the statute as to the remainder. *Semb. Damon v. Osborn*, 1 Pick. 480.

If the vendor give the vendee an order on a third person, who has possession of the goods, for their delivery, it is sufficient to take the case out of the statute. *Hollingsworth v. Napier*, 3 Caines' Rep. 185. See also *Wilkes v. Ferris*, 5 Johns. 335.

Where, on a sale of cattle, no earnest money was paid, nor any memorandum in writing made, and the cattle were to remain in the vendor's possession, at the vendee's risk, until he called for them, and the vendee afterwards came and took away the cattle, without saying any thing to the vendor—it was held that there was a sufficient delivery within the statute. *Vincent v. Germond*, 11 Johns. 283.]

fective memorandum (a). And it was held that parol evidence was inadmissible to show that there had been no stipulation as to time (b) (1).

* *If the said bargain be made or signed.*—It has been held, that the word *bargain*, as used in this clause, does not render so strict a statement of the constituent and essential members of the contract necessary, as the word *agreement* does under the fourth section; a memorandum is sufficient to bind the defendant as the vendee, although it does not express the *consideration* for the promise (x), except by implication from the promise itself; but the note must express the names of both the contracting parties; and therefore a note signed by the vendor of goods, but not mentioning the buyer's name is insufficient (y).

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Bargain.

Made or signed by the parties.—A bill of parcels, in which the vendor's name is *printed*, is, it seems, a sufficient making or signing to bind the vendor (z), as a signing by him. But at all events a letter subsequently written to the vendee, admitting a contract, may be connected with the bill of parcels, to take the case out of the statute (a). So in

Signed by the
parties.

(a) *Cooper v. Smith*, 15 East, 103.

(b) *Ibid.*

(x) *Egerton v. Matthews*, 6 East, 307, [and Mr. Day's note.] But there the consideration did appear by necessary inference. *Vide supra*, 602.

(y) *Champion v. Plummer*, 1 N. R. 252; *vide supra*.

(z) *Saunderson v. Jackson*, 2 B. & P. 238. Note, in this case a letter referring to the contract was afterwards written by the vendor to the vendee; and note also, that the vendee's name appeared in the bill of parcels. See 1 N. R. 254.

(a) *Ibid.* In *Schneider v. Norris*, 2 M. & S. 286, Dampier, J. intimated that in the case of *Saunderson v. Jackson*, the case was taken out of the operation of the statute by the subsequent letter only. In an action by the vendee of goods against the vendor, for breach of contract, a letter written by the plaintiff, stating the terms

(1) [A memorandum of a contract for the sale of a certain number of bales of cotton, at a certain price per pound, was held to be sufficient, though it did not specify the weight of the bales, nor refer to any invoice by which the weight might be ascertained. *Penniman v. Hartshorn & al.* 13 Mass. Rep. 87. Where a common bill of parcels is given, at or after the purchase of goods, it does not preclude either party from resorting to other evidence to prove the contract. *Bradford v. Manly*, 13 Mass. Rep. 139. If after a parol contract for the sale of goods, the vendor deliver to the vendee a bill of parcels, it will be a sufficient memorandum in writing to take the case out of the statute—and if the contract originally made differ from that proved by the bill of parcels, it will be of no effect. *Whitwell & al. v. Wyer & al.* 11 Mass. Rep. 6. The form of the memorandum is not material; but it must state the contract with reasonable certainty, so that the substance of it can be understood from the writing itself, without recourse to parol proof. *Bailey & al. v. Ogden*, 3 Johns. 399.]

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Signature.

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By agent.

Schneider v. Norris (b), where the name of the vendor (the defendant) in the bill of parcels was *printed*, but the defendant had written the vendee's name upon it, it was held to be a sufficient signature. An agreement, beginning 'I, A. B. agree to sell,' although not otherwise signed by the party, is sufficient to bind the vendor (c) (1).

* By the parties *to be charged*.—It is sufficient if the memorandum be signed by the defendant, the vendor; though it was not signed by the plaintiff, the vendee; and although it could not have been enforced against the latter (d) (2).

Or their agents thereunto lawfully authorized.—A broker is an agent for both parties, and they are bound by the entry of the contract which he makes in his book, and of which the bought-and-sold notes are copies (e).

In the case of sales by auction, it seems to be now settled that the auctioneer is an agent lawfully authorized by the buyer to sign a contract for him (f). The authority in

of the contract, coupled with an answer written by the defendant's attorney, insisting that the contract has been performed *pro tanto*, is sufficient evidence of the contract. *Jackson v. Lowe*, 1 Bing. 9.

(b) 2 M. & S. 286.

(c) *Knight v. Crockford*, 1 Esp. C. 190.

(d) *Allen v. Bennett*, 3 Taunt. 169; *vide supra*, 606.

(e) *Heyman v. Neale*, 2 Camp. 337. *Rucker v. Cammeyer*, 1 Esp. C. 105. [*Merritt v. Clason*, 12 Johns. 102. 14 ib. 484.]

(f) *Emmerson v. Heelis*, 2 Taunt. 38. *Hinde v. Whitehouse*, 7 East, 558. *Simon v. Motivos*, 1 Bl. Rep. 599. The auctioneer's signature of the name of the purchaser's agent is binding on the principal. *Kemys v. Proctor*, 1 J. & W. 350.

(1) [An entry made by the vendor, in a memorandum book, of the name of the vendee, and of the terms of the contract, which was read to the vendee's agent who made purchase, and assented to by him as correct, was held to be insufficient—not being signed by the party to be charged, or by his agent. *Bailey & al. v. Ogden*, 3 Johns. 399. Query, whether the vendor is bound by such memorandum so that the vendee could enforce the contract? *ibid*. It is not a valid objection that the name of the party to be charged is written above the body of the memorandum. *Penniman v. Hartshorn & al.* 13 Mass. Rep. 87. A memorandum of a contract written by the broker employed to make the purchase, with a lead pencil, in his memorandum book, in the presence of the vendor—the names of the vendor and vendee, and the terms of the purchase, being in the body of the memorandum, but not subscribed by the parties—was held to be sufficient. *Merritt & al. v. Clason*, 12 Johns. 102—affirmed on error, 14 Johns. 484.]

(2) [*Penniman v. Hartshorn & al.* Per Parker, C. J. 13 Mass. Rep. 92. *Merritt & al. v. Clason*, 12 Johns. 102. 14 ib. 484. *Douglas v. Spears*, 2 Nott & M'Cord, 207. *acc.* See *Weightman v. Caldwell*, 4 Wheat. 85.]

such a case is given by bidding aloud; and where the name of a purchaser of different lots is written by the auctioneer opposite to the different articles for which the purchaser is the highest bidder on the sale-bill, the memorandum is sufficient to satisfy the statute (g) (1). So where the auctioneer wrote the initials of the agent of the buyer's name, together with the prices opposite to the lots purchased, in the printed catalogue, and the principal afterwards, in a letter to the agent, recognized the purchase (h). But where the auctioneer signs the name of a buyer on a mere catalogue of the goods, which is neither connected with nor refers to the conditions of sale, which are read at the time of sale, it seems that this is not a memorandum of a contract of sale according to those conditions (i).

* Where both the parties had agreed that *A. B.*, a broker, should manage a sale between them, for which they were in treaty, and the vendee some days afterwards informed *A. B.* that he had made the bargain and desired him to put down the terms, which *A. B.* accordingly did, and then sent a sale-note to the vendor, and the vendee did not return the note, but in a conversation with *A. B.* some days afterwards, regretted that she had sold the goods, it was held to be evidence to the Jury of authority from the vendor to *A. B.* (k). But although the owner has authorized a broker to sell, and the latter has made a verbal contract with the vendee, the owner may revoke his authority to the broker at any time before the sale-note is made out (l).

Where the agent of the vendor wrote the note in the vendor's order-book in the presence of the vendee, although he afterwards, at the desire of the vendee (the defendant) read it over to him, it was held that the signature was not sufficient (m); and it has been held, that one of the contracting parties could not be considered as the agent of

(g) Ibid. [*Davis v. Robertson*, 1 Rep. Con. Ct. 71. *McComb v. Wright*, 4 Johns. Ch. Rep. 659.]

(h) *Phillimore v. Barry*, 1 Camp. 513.

(i) *Hinde v. Whitehouse*, 7 East, 558. And so decided in the case of *Kenworthy v. Schofield*, Sittings in Bank, after Easter T. 1824.

(k) *Chapman v. Partridge*, 5 Esp. C. 256, Cor. Mansfield, C. J.

(l) *Farmer v. Robinson*, 2 Camp. 339, n.

(m) *Cooper v. Smith*, 15 East, 103.

(1) [The original memorandum made by the auctioneer must be produced, if in existence: A copy of it is not evidence. *Davis v. Robertson*, 1 Rep. Con. Ct. 71.]

PART the other, although the other overlooked him, and gave him
 IV. directions as to the terms (n).

FRAUDULENT CONVEYANCE.

Fraudulent
 conveyance.

- * 616 WHERE the conflict is between the sheriff, who has taken goods in execution at the suit of a judgment-creditor, and one who claims them by virtue of an assignment from the debtor, the judgment-creditor may impeach the transaction, either by evidence to show * that the transfer was merely colourable, and made with intent to protect the goods (which really remained the property of the debtor) from the execution, or if an assignment has been regularly executed so as to transfer the goods as between the debtor and the assignee, yet that as against a creditor the conveyance is void under the stat. 13 Eliz. c. 5. To prove the first position, the time of the transfer, with relation to the plaintiff's action, verdict and judgment (as if it be made immediately after a verdict for the plaintiff), the connection between the parties (as where it is made to a son or daughter), the secrecy with which it was made, the want of consideration, as evidenced by the probable inability of the supposed purchaser, are obviously material and important circumstances to be submitted to a Jury (v).

In cases upon the stat. 13 Eliz. c. 5 (o), it is usually a question of fact for the Jury whether the assignment

(n) *Wright v. Dannah*, 2 Camp. 203.

(v) A conveyance by a bill of sale is good against the party executing it, and against his assignees, although it be void as to third persons. *Robinson v. McDonnell*, 2 B. & A. 134.

A conveyance is void under the st. 27 Eliz. against a purchaser for value, although he had notice of a fraudulent conveyance. *House v. Bullock*, cited 5 Co. 60. *Doe d. Otley v. Manning*, 9 East, 59.

(o) This stat. recites, that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, which have been contrived of malice, fraud, covin, collusion, &c. to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, &c. enacts that every feoffment, &c. of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution made for any intent or purpose before declared and expressed, shall be as against that person, his heirs, successors, executors, &c. whose actions, suits, &c. are or might be in anywise disturbed, hindered, delayed or defrauded, utterly void. By sec. 6, the act is not to extend to any estate or interest in lands, &c. on good consideration, and *bona fide* lawfully conveyed to any person, &c. not having notice of such covin, &c. A conveyance not fraudulent within this statute may yet be void in case of bankruptcy, under the stat. 21 Jac. I. c. 15.

has been executed with *intent* to defraud either the creditors generally, or some particular creditor (*p*).

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* The question of fraud in such cases may be a question of law, or a question of fact, or a mixed question of law and fact (*q*). When the fraud may be collected from the instrument itself, or from the deed coupled with the extrinsic circumstances and situation of the parties, it is a question of law arising upon the facts so found, but when it depends upon *intention*, the existence of that intention is a fact which must be found by a Jury (*r*).

Fraudulent
conveyance.
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If the conveyance be absolute, it seems that proof of the vendor's remaining in possession will be conclusive as to fraud, but that it is otherwise where the conveyance is but conditional, to take effect on a particular contingency, or at a future time.

Continuance
of the as-
signor's pos-
session.

It has been held, that the absolute transfer of personal chattels without a delivery of possession is not merely *evidence* of fraud, but is actually void for * fraud (*s*), (1) and * 618

(*p*) *Leonard v. Baker*, 1 M. & S. 251; where it was so left by Ld. Ellenborough, who also left it to the Jury to say whether the sale was *notorious*. And see *Kidd v. Rawlinson*, 2 B. & P. 59; where Ld. Eldon left it to the Jury to say what was the object of the sale. In *Cadogan v. Kennett*, Cowp. 432, where a settlement had been made of goods previous to the marriage, Ld. Mansfield said, the question in every case is, whether the act is a *bona fide* transaction, or a trick and contrivance to defeat creditors; and in *Dewey v. Bayntun*, 6 East, 257, the same principle was recognized by the Court. See Ld. Eldon's observations, in *Lady Arundel v. Phipps*, 10 Ves. 139.

(*q*) Per Buller J. *Estwick v. Caillaud*, 5 T. R. 420; *supra*, Part III. 427.

(*r*) In *Estwick v. Caillaud*, (5 T. R. 420) trespass was brought by the plaintiff against the sheriff, who levied under an execution at the suit of Townsend, a creditor of Ld. Abingdon. Ld. Abingdon had conveyed by deed his real and personal property to the plaintiff in trust out of the rents and profits to pay one moiety to the grantor for his own use, and the residue amongst certain creditors specified in a schedule. Grose, J. left it to the Jury to say whether this was a fraudulent transaction, for the benefit of Ld. Abingdon, to deceive his creditors; or, 2dly, to defraud the other creditors in general, or Townsend in particular. The Jury negatived the fraud, and the Court held that there was no ground to impeach their verdict. [See *Sturtevant v. Ballard*, 9 Johns. 337. *Smith v. Niel*, 1 Hawks, 341.]

(*s*) *Edwards v. Harben*, 2 T. R. 587. *Bamford v. Baron*, cited in the note. *Reid v. Blades*, 5 Taunt. 212; where it was held that a conveyance of chattels, unaccompanied by possession, was void, although the same instrument contained a valid mortgage of leasehold buildings in which the chattels were situated.

(1) [The doctrine that the vendor's remaining in possession, after an absolute immediate conveyance of chattels, is conclusive evi-

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IV.

Proof of fraud,
continuing
possession.

therefore where a *creditor* took an absolute bill of sale of the debtor's goods, but left the debtor in possession, and after his death took possession of his goods, it was held that he was liable as executor *de son tort* (t). So if the possession taken be merely colourable, as where a creditor took possession on the 4th of April of the goods of a publican under a bill of sale, and the person in possession allowed the publican to serve out liquors and receive money as usual till the next day, when the goods were seized under an execution (u). So where the vendor remains jointly in possession with the servant of the vendee, the assignment is fraudulent and void against creditors (x). This however is a legal presumption, which is not absolutely conclusive as to fraud.

In *Twyne's* case (y) the continuance of the vendor's pos-

(t) Ibid.

(u) *Paget vs Perchard*, 1 Esp. C. 205. [and Mr. Day's note.]

(x) *Wordall v. Smith*, 1 Camp. 333. And see *Cadogan v. Kennett*, Cowp. 432. *Jarman v. Woolton*, 3 T. R. 618. *Darley v. Smith*, 8 T. R. 82.

(y) 3 Co. 80.

dence of fraud, or fraud *per se*, has been adopted, or strongly countenanced, by the Supreme Court of the United States, and the courts of Virginia, Kentucky, and Pennsylvania. *Hamilton v. Russell*, 1 Cranch, 309—*Alexander v. Deale*, 2 Munf. 341. *Thomas v. Soper*, 5 Munf. 28. *Fitzhugh v. Anderson & al.*, 2 Hen. & Mun. 289—*Baylor v. Smithers*, 1 Littell's Rep. 112—*Clow v. Woods*, 5 Serg. & Rawle, 278. *Daves v. Cope*, 4 Binney, 258. See also *Croft v. Arthur*, 3 Desauss. 229, in the court of chancery in South Carolina.

Such possession is held, in Massachusetts, New Hampshire, and North Carolina, to be only strong *prima facie* evidence of fraud, and legally susceptible of an explanation consistent with good faith. *Brooks v. Powers*, 15 Mass. Rep. 247. *Bartlett v. Williams*, 1 Pick. 295. *Badlam v. Tucker & al.*, 1 Pick. 399. *New England Marine Ins. Co. v. Chandler & trustee*, 16 Mass. Rep. 279—*Haven v. Low*, 2 N. Hamp. Rep. 13—*Trotter v. Howard*, 1 Hawks, 320. *Cox v. Jackson*, 1 Hayw. 423.

It might perhaps be inferred from the case of *Sturtevant v. Ballard*, 9 Johns. 337, that the strict doctrine prevails in New York: But the contrary would appear from *Barrow v. Paxton*, 5 Johns. 258; *Beale v. Guernsey*, 8 ib. 446; and *Dickinson v. Cook*, 17 ib. 334. And in *Ludlow v. Hurd & al.*, 19 Johns. 218, Mr. Chief Justice Spencer treated the question as if it were still an open one in that state.

In case of a mortgage of chattels, the mortgagor's remaining in possession is held not to be necessarily fraudulent. *Haven v. Low*, and *Barrow v. Paxton*, ubi sup. *Cortelyou v. Lansing*, 2 Caines' Cas. in Error, 206. *Bissell v. Hopkins*, 3 Cowen, 166. *Claybornes v. Hill*, 1 Wash. 177. *Holmes & al. v. Crane*, 2 Pick. —. (Sed vide *Clow v. Woods*, ubi sup. contra.)

Where a deed, absolute on its face, is made of chattels, a defeasance made at the same time, but separate from it, shall not operate as a mortgage to the prejudice of third persons. *Gaither v. Mumford*, 2 Taylor, 167. See also *Gorham v. Herrick*, 2 Greenleaf, 87.]

session was considered to be merely evidence of fraud. There, *A.* being indebted to *B.* and also to *C.* who bought his action, made a secret conveyance of his goods to *B.*, but continued in possession, and the conveyance was held to be fraudulent within the act (*z*); 1st, because the gift was general; 2dly, because the donor continued in possession of the goods and used them as his own; and 3dly, because it was made pending * the writ (*a*); and in the law of *Nisi Prius* (*b*) it is laid down that the donor's continuance in possession is not always a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money (*c*).

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IV.

Proof of fraud,
continuing
possession.

* 619

In the case of *Kidd v. Rawlinson* (*d*) *K.*, the plaintiff, bought the goods of *A.* from the sheriff, who sold publicly under an execution against *A.* (*K.* not being a creditor) and afterwards allowed *A.* (being a publican) to remain in possession, and afterwards *A.* made a bill of sale of the goods to *R.* the defendant, who took possession, the Jury negatived any intention on the part of the plaintiff to defeat any execution by any creditor of *A.*, and the Court afterwards held that the plaintiff was entitled to recover. The case was distinguished from *Twyne's* by two circumstances, the notoriety and publicity of the sale, and the fact that *K.* the purchaser was not a creditor; and it was assimilated * to the case in Buller's *Nisi Prius* above referred to, and said that *K.* might be considered to have lent the

* 620

(*z*) 18 Eliz. c. 5.

(*a*) B. N. P. 258. And it was said that it was not within the proviso of the act; for although made on a good consideration, it was not made *bona fide*.

(*b*) B. N. P. 258, cites Ca. K. B. 287.

(*c*) *Meggott v. Mills*, 1 Ld. Raym. 286; where Ld. Holt said, that if the goods had been assigned to any other creditor, the keeping possession of them would have made the bill of sale fraudulent as to other creditors; but that, since the agreement was originally made for securing the money lent, it was good and honest.

(*d*) 2 B. & P. 59. Cor. Ld. Eldon, 3 Esp. C. 52. So if the goods of *A.* be sold under a *fi. fa.* to *B.* *bona fide* on a valuable consideration, and *B.* permit *A.* to remain in possession, on condition that he shall deliver over to *B.* the product from the sale of goods, the possession will not render the execution fraudulent; and on a subsequent bankruptcy the goods will not pass to the assignees of *A.* (*Cole v. Davies*, 1 Ld. Raym. 724). So where a creditor took the goods of the debtor, who had confessed a judgment, in execution, and bought them at a public auction, and then let them to the debtor for rent actually paid (*Watkins v. Birch*, 4 Taunt. 823). And a bill of sale, although unaccompanied by possession, is valid against a creditor with whose knowledge and assent it was given. *Steel v. Brown*, 1 Taunt. 381.

PART
IV.Fraudulent
conveyance—
continuing
possession.

money to *A.* and to have taken the bill of sale as a security.

It is to be observed also, that there is another circumstance in the above case (which does not appear to have been adverted to) which very materially distinguishes it from *Twyne's*, viz. that the sale was not made by the party himself, but by the sheriff. The object of the statute was to prevent covinous and fraudulent sales by the owner to the prejudice of creditors, and not, as it seems, to sales made by a third person, as a sheriff under an execution, or a landlord under a distress, without proof of some fraud or collusion on the part of the owner, which in effect makes such a sale his own act. Where the sale is made *bona fide* by a third person, the subsequent possession by the debtor will not render it fraudulent, for the act was not intended to prevent the legal owner of goods from allowing another person to keep possession of them.

Where a trustee, under an assignment by a tenant, for the benefit of creditors, bought the goods of the tenant out of the trust funds, under a sale by the landlord on a distress for rent, and afterwards allowed the tenant to continue in possession, it was held, in the absence of any evidence that the sale was colourable and fraudulent, that the goods were protected from an execution by a judgment-creditor; and Lord Ellenborough said that the doctrine of possession did not apply to a case of conveyance, not by the party himself, but by a third person (*e*).

- * 621 * But a possession by the vendor, which *follows* and accompanies the deed, where the sale is not to take place immediately, but at a future specified time, or on a particular condition, does not avoid the transfer (*f*). But in such cases, although the want of possession may cease to

(*e*) *Guthrie v. Wood*, 1 Starkie's C. 367. So, where the goods of a debtor were sold publicly by trustees under an assignment for the benefit of creditors, and the son of the wife of the debtor purchased the goods, and removed part, but left the rest in the possession of his mother, and for her accommodation, it was held that these were protected against an execution by a judgment-creditor, who had notice of the assignment. *Leonard v. Baker*, 1 M. & S. 251.

(*f*) Per Curiam, *Edwards v. Harben*, 2 T. R. 587; where the distinction between possession, on an absolute sale, and possession under a conditional sale was considered as having been long and decidedly established. And *Stone v. Grubham*, 2 Bulstrode, 218, was referred to, and *Bucknall v. Roiston*, Pr. in Ch. 287; and also the following cases, *Ld. Cadogan v. Kennett*, Cowp. 432. *Haslington v. Gill*, Trin. 24 Geo. III. B. R. were cited to show that the bill of sale is not fraudulent for want of possession, where possession has *followed* the deed, although there was no immediate possession by the assignee.

be a badge and evidence of fraud, yet the transaction is still liable to be impeached by other evidence of fraud, and it is particularly open to the inquiry, whether the interposing a delay between the execution of the transfer, and the time of taking possession, may not be part of the fraudulent contrivance.

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It has been said that no conveyance shall be deemed to be fraudulent under the above statute, unless it can be proved that the party conveying the goods was indebted at the time of the conveyance, or nearly so (*g*), * although there have been decisions to the contrary (*h*); for there would be a difficulty in showing that the object of the conveyance was to delay the creditor. Still it seems, that if a conveyance could be proved to have been made with a view to defraud a future creditor it would be void under the statute (*i*).

Solvency of
assignor.

* 622

An assignment by a defendant, pending the plaintiff's suit, of all his effects, for the benefit of his creditors, under which possession is immediately taken, is not fraudulent (*k*), although made to delay the plaintiff's execution; neither is it fraudulent to confess a judgment to one creditor in order to defeat the pending execution of another creditor (*l*), for a debtor, as well as an executor, may give preference to a particular creditor (*m*).

(*g*) B. N. P. 257. *Waller v. Burrows*, in Canc. 1745. *Taylor v. Jones*, 1743. Ibid. And see *Lush v. Wilkinson*, 5 Ves. 384; where, on a bill against the widow, by one who became a creditor subsequent to the settlement, Ld. Alvanley intimated that the proof of a single antecedent debt would not do, and that it must depend upon this, whether the husband was in insolvent circumstances at the time. And see *Russel v. Hammond*, 1 Atk. 15. *Middlecome v. Marlow*, 2 Atk. 220. Ld. *Townsend v. Wyndham*, 2 Ves. 1. 10. In *Hungerford v. Earle*, 2 Vern. 261, the question as to the validity of a settlement against subsequent creditors was ordered to be tried at law. But see *White v. Hussey*, Prec. in Chan. 14.

(*h*) Both by Sir J. Jekyl and Fortescue, M. R. B. N. P. 257.

(*i*) See *Estwick v. Caillaud*, 5 T. R. 420. As to conveyances made to defraud a purchaser, see the stat. 27 Eliz. c. 4, and the notes, Evans's St. Vol. I. p. 382, & sequent. [*Astor v. Wells & al.* 4 Wheat. 466. *Bean v. Smith & al.* 2 Mason's Rep. 252. *Anderson & al. v. Roberts & al.* 18 Johns. 515.]

(*k*) *Pickstock v. Lyster*, 3 M. & S. 371. See also *Meux v. Howel*, 4 East, 1.

(*l*) *Holbird v. Anderson*, 5 T. R. 235.

(*m*) Ibid. and see *Tolputt v. Wells*, 1 M. & S. 395. *Estwick v. Caillaud*, 5 T. R. 424. *Stilman v. Ashdown*, 2 Atk. 477.

UPON an action (*n*), or information under the stat. 5 Ann. c. 14, s. 4, (*o*), the proofs are, 1st, the keeping or
 * 623 using of the dog or instrument as alleged; * 2ndly, within
 the county, &c.; 3dly, by an unqualified person (*p*); and
 * 624 4thly, the commencement of * the proceedings within due

(*n*) Given by the stat. 8 Geo. 1. c. 19, s. 1.

(*o*) Which enacts, that "If any person*, not qualified, shall keep or use any greyhound, setting dogs, hayes, lurchers, tunnells or other engines to kill and destroy the game, and shall be thereof convicted, upon the oath of one or two credible witnesses, by the justice or justices of the peace where such offence is committed, the person so convicted shall forfeit the sum of 5*l*.†, one half to be paid to the informer, and the other half to the poor of the parish where the same was committed‡."

(*p*) By stat. 22 & 23 Car. II. c. 25, s. 3, "Every person not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of 100*l*. per annum§, or for term of life||, or having lease or leases of ninety-five years, or for any longer term, of the clear yearly value of 150*l*. (other than the son and heir apparent of an esquire)¶, or other per-

* These words include a minor (Christian's G. L. 191.) As also a married woman using guns or engines to destroy game, or using a grey-hound, setting-dog, &c. to destroy game, not being in her husband's company (*ibid.*); she may be qualified by lands in her own right, but her husband's qualifications will not qualify her. *Ibid.*

† If several join in the act of killing a hare, but one penalty can be recovered (*R. v. Bleasdale*, 4 T. R. 809. *Hardyman v. Whitacre*, B. N. P. 189. 2 East, 573, *in note*); but if the acts be several and distinct, as if each use a gun, or set a snare, each is subject to a distinct penalty (Christian's G. L. 161). It has even been held, that if a person kill several hares in the same day, he forfeits but one penalty (*R. v. Matthews*, 10 Mod. 26, *tam. qu.*); but he may be convicted, at the same time, in several penalties in respect of so many offences committed on several days. *R. v. Scallow*, 8 T. R. 224.

‡ By the stat. 2 Geo. III. c. 19, s. 5, the informer is entitled to the whole penalty recovered in an action.

§ If by mortgage the interest reduce the rent or value to less than 100*l*, the estate confers no qualification. *Wetherall v. Hall*, Cald. 230.

|| A life-estate, such as in an ecclesiastical living, confers no qualification, unless it be of the value of 150*l*. per annum (*Lowndes v. Lewis*, Cald. 188, by Mansfield, L. C. J. and Ashurst & Buller, Js, Willes, J. *dissent.*) An estate to be held by the party under a lease to trustees, if he and others should so long live, of the annual value of 150*l*., is sufficient. *Earl Ferrers v. Henton*, 8 T. R. 506.

¶ For the description of those who are properly so entitled, see 1 Com. 406. Christian's G. L. 130. Camden & Spelman, *de voce*. All persons styled esquires under the King's sign manual, as sheriffs and captains in the army, are esquires (Christian's G. L. 132); so also are barristers (1 Wils. 245). But a commission by the lord lieutenant of a county, constituting a person captain commandant of a corps of volunteer infantry, and styling him esquire, does not constitute him esquire so as to qualify his heir apparent, for a lord lieutenant cannot confer honours: *Talbot v. Egale*, 1 Taunt. 510.

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IV.

time (q).—1st. Whether the defendant kept or used a dog or instrument for the destruction of game, is a question of fact depending on the acts done, and the intention of the agent as collected from his declarations and conduct. The offence may consist in the keeping as well as in the using; and although the actual using the dog or instrument for the apparent purpose of destroying game is satisfactory evidence to show the purpose in keeping, it is not essential, and the keeping with that intent may be established by other means (r). In such a case there is a difference between the keeping an instrument, such as a gun, which may be used for the purpose of defence and protection, as well as for the destruction of game, and the keeping a dog, or instrument, not usually applied to any purpose except that of killing game. But in all cases the intention is a question of fact to be inferred from the circumstances (s); and the mere keeping of a gun or * other instrument which may be and usually is kept for innocent purposes, is no evidence of a keeping with an unlawful intent, though it seems to be otherwise in the case of lurchers, hare-pipes and other instruments which are peculiarly fitted for and appropriated to the destruction of game (t). But the keeping of a gun or any other instrument is within the statute,

Proof of keeping a dog, &c. to kill game.

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son of higher degree*, and the owners and keepers of forests, parks, chases and warrens) are prohibited from having, keeping, or using any guns, bows, greyhounds, setting dogs, ferrets, coney dogs, lurchers, hays, nets, lowbels, harepipes, gins, snares, or other engines aforesaid."

(q) By the stat. 2 Geo. III. c. 19, s. 6, the action must be brought within six months, i. e. lunar months. *Lee v. Clarke*, 2 East, 333.

(r) *Read v. Phelps*, 15 East, 271. *R. v. Filer*, 1 Str. 496. *R. v. King*, 1 Sess. C. 88. If the defendant negative the intention by showing that the dog has been kept tied up, he is not liable. *Hayward v. Horner*, 5 B. & A. 317; or that it was kept as a house-dog. *Briarly v. Althorp*, cited ib. in notes.

(s) In *R. v. Hartley*, (Cald. 175. 2 Burn's J. tit. Game, s. 3,) which was a conviction for keeping a greyhound, *Ld. Mansfield* said that the keeping a thing prohibited by the act is *prima facie* evidence of a keeping it for the purpose prohibited, and it is incumbent on the defendant to show that it is kept for another purpose, as a house or favourite dog.

(t) *R. v. Gardiner*, Andr. 255. 2 Str. 1098. 14 Vin. Ab. 3. 2 Sess. C. 204. 385. In *R. v. Thompson*, (2 T. R. 18), the Court said the keeping a gun is in itself ambiguous, and it must be shown to have been kept for the purpose of killing game, in order to bring the party keeping it within the act. See also *R. v. Filer*, Str. 496.

* These words do not qualify the esquire himself (*R. v. Utley*, cited 1 T. R. 48. *Jones v. Smart*, 1 T. R. 44.) A Scotch diploma to a physician does not constitute him of higher degree than an esquire. *Jones v. Smart*, 1 T. R. 44.

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if it can be proved that it is *used* by the owner for such unlawful purposes, or, *perhaps*, if the intent can be fully and clearly established by other evidence (*u*).

Proof of using
a dog, &c. to
kill game.

It is not necessary to prove an *using* in the very act of destroying game, the walking about with a gun, with the *intent* to kill game, is an using of it for the purpose (*x*).

Proof of using.

The intent of which the Jury or Magistrate ought to be satisfied in order to convict, is a fact to be presumed and inferred from the conduct of the defendant and all the circumstances of the particular case. It is enough, if, upon the face of the conviction such reasonable and *prima facie* evidence of the intent appear, as would have been sufficient in an

* 626 action to have been left to a Jury (*y*). This is sufficient to *support* the conviction, but to warrant the magistrate in convicting, the evidence ought to be such as to satisfy his conscience of the intent of the party to pursue game (*z*).

Evidence that the defendant, being an unqualified person, went out to course hares with one who was qualified, and that he took an active part in the sport, beating the bushes to find a hare, and in afterwards securing a hare which had been killed, was held to be insufficient evidence of an using by the defendant, for he did not use dogs himself (*a*), they were not under his control. But it seems, that if an unqualified person were to use his own greyhound for the purpose of sporting, although in company with a

(*u*) But in *Read v. Phelps* (15 East, 271), which was an action for keeping and using a setting-dog to kill and destroy game, the plaintiff was nonsuited, because no evidence was adduced to show that the dog, which was a young one, had been *used* for the purpose; and the Court, on a motion to set aside the nonsuit, on the ground that the purpose might be inferred from other circumstances, inquired whether in any case a penalty had been recovered for keeping a dog, without any evidence of its having been used by the party for the purpose of killing game, and it being admitted that no such case was to be found, refused the rule. So as to a gun, see the cases in the last note.

(*x*) *R. v. King*, Sess. C. 88, per Parker, C. J. See also *Hebden v. Hentey*, 1 Chit. Rep. 607.

(*y*) *R. v. Davis*, 6 T. R. 177.

(*z*) See Mr. Christian's observations, in his *Game Laws*, 157, 8.

(*a*) *Lewis v. Taylor*, 16 East, 49, overruling a case said to have been ruled by Lawrence, J. Stafford. Lent. Ass. 1804. And see *R. v. Taylor*, 15 East, 462; where it was held that a groom attending his qualified master whilst he used dogs for killing game, and pursuing it by his master's command, was not liable to the penalties of the stat. And see *R. v. Newman & others*, Lofft's R. 178, and *Molton v. Rogers*, 4 Esp. C. 217; where Ld. Ellenborough gave his opinion that an unqualified person joining in the sport with the owner of the dogs who was qualified, was not liable to the penalty.

qualified person, the case might admit of a different consideration (b). If an unqualified person seek to protect himself by the qualification of another, it will be incumbent upon him to give strict proof of the qualification (c).

2dly, *Within the county, &c.*—If a man, standing in one parish or county, shoot at game in another, he uses the gun in the district in which he stands (d). Since the statute, upon a conviction, gives part of the * penalty to the poor of the parish where the offence is * 627 committed, it must be proved that the offence was committed within the parish, or the variance will be fatal (e), otherwise it may be ascribed to venue (f).

3dly. *The want of qualification.*—It seems that in an action (g), and also in an information (h) before a magistrate, it is unnecessary to adduce evidence to negative the defendant's qualification (j). After proof has been given of the keeping or using, &c. it lies on the defendant to prove his qualification. Proof that he had sworn on a former day, under the income-tax act, that his income did not exceed 50*l.* was held to be evidence to negative the qualification (i).

If the defendant justify killing game as a game-keeper, he must produce and prove his deputation from the lord of the manor. As game-keeper.

(b) Per Ld. Ellenborough, *Lewis v. Taylor*, 16 East, 49.

(c) *Clarke v. Broughton*, 3 Camp. 328.

(d) *R. v. Alsop*, 1 Show. 339. See tit. *Penal Action*.

(e) *Clarke v. Taylor*, 3 Esp. C. 218.

(f) Ibid. and see *Case, Action on*. By the stat. 2 Geo. III. c. 19, the whole of the penalty under the stat. 5 Ann. is given to the plaintiff.

(g) *R. v. Stone*, 1 East, 639. *R. v. Turner*, K. B. Trin. 1816.

(h) This was formerly doubted; and in the case of *R. v. Stone*, (1 East, 639,) Ld. Kenyon, C. J. and Grose, J. were of opinion that such qualification ought to be negated. In the case of *Frontine v. Frost*, (3 B. & P. 307,) Chambre, J. said, in convictions for killing game without a qualification, slight evidence of the want of qualification is required. In *R. v. Turner*, K. B. Trin. 1816, (Burn's J. tit. *Game*, Chetwynd's edit. 513,) the Court held that the same rule applied in case of informations as in the case of an action. Indeed, it is difficult to conceive how the substitution of a magistrate for twelve jurymen can alter the nature of the evidence to prove the same offence.

(j) Slight proof of qualification is usually sufficient; proof of deeds of lease and release to the defendant's father, coupled with proof of possession, was held to be sufficient evidence, although the defendant had paid one penalty into court. *Smith v. Jefferies*, 9 Price, 757.

(i) *R. v. Clarke*, 8 T. R. 220.

PART
IV.Qualification
as game-
keeper.Title to the
manor.

the manor (*k*), and show that he is * the lord of such manor (*l*). Where the defendant proved a deputation to kill game for the use of the lord of the manor, it was held, that it might be presumed that the game which he killed was intended for the use of the lord, there being no evidence to the contrary (*m*).

The Courts will not allow the title to a manor to be tried in this form of action, although the parties consent to do so (*n*). It is sufficient therefore to show a colourable title as lord of a manor, as by proof of seisin in fact, and the exercise of manorial rights (*o*), the appointment of gamekeepers from time to time, the enrolment of their deputations with the clerk of the peace, and the grant of certificates to such gamekeepers. And for this purpose the enrolment books of deputations kept in the office of the clerk of the peace, are admissible in evidence, without the production and proof of the deputations themselves (*p*).

* 629 So the holding * of manor courts (*q*), and acts of cutting down tember on the wastes (*r*) are admissible in evidence

(*k*) By the stat. 22 & 23 Car. II. c. 25, s. 2, all lords of manors or other royalties (not under the degree of an esquire) may by writing under their *hands and seals* authorize one or more gamekeepers. And see 48 Geo. III. c. 93, which authorizes lords of manors to appoint *any person* to be a gamekeeper, with power to kill game, whether qualified or not, for his own use, or that of any other person specified in the appointment. By 9 Ann. c. 25, s. 1, a lord of a manor cannot appoint more than one gamekeeper within each manor.

(*l*) *Calcraft v. Gibbs*, 4 T. R. 681. *Hankins v. Bailey*; *Hunt v. Grimes*, cited *ibid*. A college may appoint a gamekeeper under their seal. *Spurrier v. Vale*, 10 East, 413.

(*m*) *Spurrier v. Vale*, 10 East, 413. The defendant had a deputation under New College, Oxford, was a gardener, and lived in the house of a stranger to the manor.

(*n*) *Blunt v. Grimes*, 4 T. R. 682. *n*. *Calcraft v. Gibbs*, *Ibid*. 681.

(*o*) *Ibid*.

(*p*) *Hunt v. Andrews*, 3 B. & A. 341. For the act of parliament directs a certificate to be made upon a stamp; and it is the duty of the officer to keep a list of the certificates granted; and as it is his duty to register deputations, the register is a public document made by an authorized officer (*ibid*). And it seems that they are not evidence merely to show that such enrolments were made, but also to show that those who caused them to be made exercised rights as lords of the manor. *Ibid*. per Bayley, J. See *Kinnerley v. Orpe*, Doug. 56; & *supra*. Vol. I. p. 172. & *sequent*.

(*q*) But a court is a matter of distinct grant, and does not necessarily belong to a lord of a manor. 3 B. & A. 348.

(*r*) But the felling of timber is a right belonging to the owner of the soil, and not to the lord of the manor. Per Abbott, C. J. 3 B. & A. 347.

for the purpose of establishing the title to the manor. But it is no defence that the defendant acted as game-keeper under a *bona fide* belief that his principal was really entitled to the manor, there being no ground for the claim (s). And evidence of the real title to the manor is admissible, in order to negative the evidence of a colourable title (t) and, as is said, to show that the claimant *knew* that he had no real title (u); and for this purpose it is competent to the plaintiff to show, by the enrolment book of the deputations, kept in the office of the deputy clerk of the peace, that manorial rights had been long exercised by the party, and his ancestors, who were legally entitled to the manor (u).

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IV.
Qualification
as game-
keeper.
Title.

The boundaries of a manor cannot be tried in this form of action (x).

4thly. *Within due time.*—That is, within six months, in the case of an action (y), and within three months * in the case of a conviction (z). It is sufficient in the former case to prove the issuing of process in that action within the six months (a), but in the latter case the conviction itself must take place within the three months (b).

Within due
time.
* 630
Commence-
ment of the
action.

The stat. 9 Ann. c. 25, s. 2, enacts, that if any hare, &c. shall be found in the possession of any person not qualified in his own right to kill game, or being entitled thereto under some person so qualified, the same shall be taken to be an exposing to sale (c). But still a mere possession of game by an unqualified person may be explained by evidence to be a lawful possession, for otherwise no case could

Exposing to
sale.

(s) *Calcraft v. Gibbs*, 4 T. R. 681. 5 T. R. 19. Mr. Roebuck had purchased from the plaintiff (lord of the manor of Northfleet) an estate called Ingress, lying within the manor, and it had been agreed that Mr. Roebuck should have the deputation, and two certificates had been granted to the defendant as the gamekeeper of Mr. Roebuck.

(t) *Hunt v. Andrews*, 3 B. & A. 341.

(u) *Ibid.*

(x) It appeared that the defendant, as gamekeeper to Sir R. Hoare, of his manor of Brixton, had constantly shot over the place where the pheasant was killed. No evidence having been given to show that the place was out of the manor, Buller, J. nonsuited the plaintiff, saying that he would not in such an action try the boundaries of a manor. *Hankins v. Bailey*, 4 T. R. 681, in the note.

(y) *Supra*, 624.

(z) By 5 Ann. c. 14.

(a) As to the proof, see *Hundred.—Limitation—Time.*

(b) *R. v. Tolley*, 3 East, 467.

(c) Within the stat. 5 Ann. c. 14, and 9 Ann. c. 25, s. 1.

PART
IV.

* 645

Notice of disputing the value.

In case of warranty.

dant means to deny the goodness or value of the work or materials, it is usual and proper to give notice * of his intention to the plaintiff. Where, however, the plaintiff declares on a *quantum meruit*, and there has been no stipulation as to price, such notice is clearly unnecessary; the defence can be no surprise upon him, since he must come prepared to show the value of the work done (o). Where a particular price has been agreed for, the plaintiff may have greater reason to complain of surprise if evidence of this kind be insisted upon, for otherwise he may not be prepared to prove more than the agreement and the work done, and therefore such notice should be given (p).

Where the article of sale is *warranted*, it seems that the vendee is entitled to prove the inferiority, and the breach of the warranty, in diminution of the damages, although a specific price has been agreed for, and although he has not rescinded the contract *in toto*, as he might have done, by returning the article. This is not open to the objection, that the defendant ought to have rescinded the contract *in toto*, for from the very nature of the contract of warranty he has a right to keep the goods, and recover damages for the breach of warranty (q); he may either rescind the contract altogether, by returning the goods, provided he return them as soon as the breach is discovered, and whilst they remain in the same state (r), and within a reasonable

price of pans, to be made for the purpose of the defendant's manufactory, of the best materials, at a stipulated price, Bayley, J. held that if the defendants, after giving them a reasonable trial, found them insufficient for the purposes for which they were intended, and gave notice to that effect to the plaintiff, he was bound to take them away, and they remained at his risk; but that if no notice was given, but the defendants retained the pans, they were liable to pay as much as the materials were worth. [See *Swett v. Colgate & al.* 20 Johns. 196.]

(o) *Basten v. Butter*, 7 East, 479. And that used to be the practice in Mr. J. Buller's time. Per Ld. Ellenborough. Ibid.

(p) Ibid.

(q) *Infra*, 646, note (t).

(r) In the case of *Curtis v. Hannay*, 3 Esp. C. 83, Ld. Ellenborough said, "I take it to be clear law, that if a person purchases a horse, which is warranted, and which afterwards turns out to have been unsound at the time of the warranty, the buyer may, if he pleases, keep the horse, and bring an action on the warranty, in which case he will have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty, or he may return the horse, and bring an action to recover the full money paid; but in the latter case, the seller has a right to expect that the horse shall be returned to him in the *same state* as when sold, and not by any means diminished in

* time (s), and refuse to pay the price, or recover it in case it has been paid, or he may retain the goods, and recover the difference between the real value and their value as warranted (t); and therefore it is just, as well as convenient, that he should be permitted to prove the breach of warranty in the first instance, in diminution of damages (u).

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In case of a
warranty.

* But although in the case of an express warranty, proof of notice to the plaintiff of the breach of warranty is unnecessary, yet the omission to give notice will furnish a strong presumption against the buyer, that the horse or other article had not at the time of sale the defect complained of, and will make the proof on his part much more diffi-

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of warranty.

value; for if a person keeps a warranted article for any length of time after discovering its defects, and when he returns it it is in a worse state than it would have been if returned immediately after such discovery, I think the party can have no defence to an action for the price of the article, on the ground of non-compliance with the warranty, but must be left to his action on the warranty to recover the difference." See also *Grimaldi v. White*, 4 Esp. C. 95, and *Hunt v. Silk*, 5 East, 452, where Ld. Ellenborough observed, "that where a contract is to be rescinded at all, it must be rescinded in toto, and the parties placed in *statu quo*.—(1)

(s) Per Buller, J. *Dr. Compton's case*, cited, 1 T. R. 136.

(t) *Fielder v. Starkin*, 1 H. B. 17. *Dr. Compton's case*, cited by Buller, J. 1 T. R. 136. *Buchanan v. Parnshaw*, 2 T. R. 745. There the horse was warranted sound, and six years old, and by the conditions of sale was to be deemed sound if not returned within two days; the buyer, ten days after the sale, discovered that he was twelve years old, and offered to return him, but the seller refused to take him, and the buyer sold him, and recovered on the warranty.

(u) In *Cormack v. Gillis*, (cited in *Basten v. Butter*, 7 East, 480), in an action for the value of a quantity of seeds sold under a warranty, Buller, J. held that the defendant was not at liberty to show that the seeds were not of the sort agreed for, and that the plaintiff was entitled to recover the whole price agreed for; but upon a cross-action brought, Ld. Kenyon intimated that the non-compliance with the warranty ought to have been received in the former action in reduction of damages, or to show that the seeds were of no value. Where the plaintiff sold a horse to the defendant for twelve guineas, which he warranted sound, and paid three guineas, and in fact the horse was unsound, and not worth more than 1*l.* 10*s.*, Ld. Kenyon nonsuited the plaintiff. *King v. Boston*, Middlesex Sitt. after Easter, 1789.

(1) [In *Conner v. Henderson*, 15 Mass. Rep. 319, it was held that a purchaser, who is entitled to rescind a contract, must place the vendor in *statu quo*, in order to reclaim the consideration paid: He must return the article sold, if it be of any value, however insignificant the value may be.]•

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cult (x). In a late case Lord Ellenborough observed, that where an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain by proper tests whether it is of the quality contracted for (y).

Where several articles are ordered from a tradesman at the same time, but at distinct prices, the buyer may consider the whole as one entire contract, and refuse to receive part without the rest, (1) but if he receive part, he is precluded from this objection, and must pay for as much as is furnished, according to the contract (z).

According to the general principle of law (a), where the sale is in its own nature illegal, and prohibited, or the thing be sold with an immediate view to an illegal application, no action can be maintained. Consequently the action is not maintainable for the price of libellous, obscene, or immoral prints (b); for articles of dress, sold for the express purpose of prostitution (c); or to be paid for out of the wages of prostitution (d); for drugs, sold by a druggist to a brewer, knowing that they were to be used in the brewery (e); for goods sold abroad, packed up in a

(x) See *Ld. Loughborough's* observations in *Fielder v. Starkin*, 1 H. B. 19. This was an action on a warranty of a mare; the plaintiff had kept her three months after the discovery of her unsoundness, and physicked her, and then sold her.

(y) *Hopkins v. Appleby*, 1 Starkie's C. 477; which was an action for a quantity of barilla, warranted to be of the best quality. The defendants, after discovering that it wanted half its proper strength, went on to use it till the whole had been consumed in eight successive boilings of soap, without giving any notice. The plaintiffs recovered their whole demand.

(z) *Champion v. Short*, 1 Camp. 53. Having received part, the delivery of the remainder is not a condition precedent to the payment of another portion which is delivered. See *Boon v. Eyre*, 1 H. B. 273. n.

(a) *Supra*, 87.

(b) *Fores v. Johnes*, 4 Esp. C. 97.

(c) *Boiery v. Bennett*, 1 Camp. 348.

(d) The mere circumstance of the plaintiff's knowledge that the defendant was a prostitute, is not sufficient to bar the action, unless he was to be paid out of the profits of prostitution, or the clothes were furnished with a view to prostitution. *Boiery v. Bennett*, 1 Camp. 348.

(e) *Langton v. Hughes*, 1 M. & S. 593. This was after the 42d Geo. III. c. 38, and before 51 Geo. III. c. 87.

(1) [*Bruce v. Pearson*, 3 Johns. 534. acc.]

particular manner for being smuggled into this country, and with a knowledge that they were to be so smuggled (f); or for bricks sold and delivered under the statutable size, without the knowledge of the buyer (g).

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GRANT. See tit. *Deed.*—*Presumption.*

GUARANTY.

IN an action brought upon a guaranty, unless the instrument given in evidence as such, purport to be an absolute and conclusive engagement, the plaintiff must show that he gave notice to the defendant that he accepted * it as such (h). * 649
Proof of a mere offer or proposal to guarantee is not sufficient; the plaintiff must also show that he has complied with the condition of the guaranty, if it be conditional, for

(f) *Waymell v. Reed*, 5 T. R. 599. See *Biggs v. Lawrence*, 3 T. R. 454. *Clugas v. Penaluna*, 4 T. R. 466. *Semble, aliter*, where the goods are sold abroad by a foreigner, who merely delivers the goods there, without doing any act towards the smuggling, although he knew that they were to be smuggled. *Holman v. Johnson*, Cowp. 341.

(g) *Law v. Hodgson*, 11 East, 300. [2 Camp. 147. S. C.]

(h) *Mac Iver v. Richardson*, 1 M. & S. 557; where the defendant wrote to the plaintiff thus: "I understand that A. has given you an order for rigging; I can assure you that you will be safe in crediting him, indeed, I have no objection to guarantee you against any loss from giving him this credit." Held, that without notice, &c. this did not amount to a guaranty. See also *Symmons v. Want*, 2 Starkie's C. 371. *Gaunt v. Hill*, 1 Starkie's C. 10.

The construction of a guaranty is of course a question of law; but it may be observed that the rule is, that the words are to be taken as strongly against the party giving the guaranty as their sense will admit (*Mason v. Pritchard*, 12 East, 227). A guaranty for any goods which the plaintiff "hath or may supply to W. P. to the amount of 100l." is a continuing guaranty, and extends to any goods supplied, till the credit be recalled, although goods exceeding 100l. in value have been supplied. [But see *Melville & al. v. Hayden*, 3 B. & A. 593, where Best, J. says "the case of *Mason v. Pritchard* went as far as possible."]

With respect to the construction of guaranties and conditions, as to their extent in point of time and amount, see *Liverpool Water Works Company v. Atkinson*, 6 East, 507. *Wardens of St. Saviour, Southwark v. Bostock*, 2 N. R. 175. *Hassell v. Long*, 2 M. & S. 363. [*Sturges & al. v. Robbins*, 7 Mass. Rep. 301. *Duval v. Trask*, 12 ib. 154. *Clark's Ex'ors. v. Carrington*, 7 Cranch, 300. *Lanusse v. Barker*, 3 Wheat. 101. *Russell v. Clark's Ex'ors*, 7 Cranch, 69. *Grant v. Naylor*, 4 Cranch, 224. *Laurason v. Mason*, 3 Cranch, 492. *Cremer v. Higginson & al.* 1 Mason's Rep. 323. *Rogers v. Warner*, 8 Johns. 119. *Meade v. McDowell*, 5 Binney, 195. *Clarke v. Russel*, 3 Dallas, 415. Mr. Wheaton's note to *Lanusse v. Barker*, *ubi sup.*]

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guaranty.

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such a claim being against a surety, is *strictissimi juris* (i). (1) If the guaranty import that eighteen months credit was to be given to the vendee, it is not sufficient to show that twelve months credit was given, although six more have since elapsed (k). Where the defendant had guaranteed the plaintiff against loss, in case his, the defendant's, son, became bankrupt, in order to prove the allegation that he had become bankrupt, it was held that the plaintiff was bound to prove that a commission had been actually sued out against him (l). Upon a contract to guarantee a bill of exchange for a given sum, the guarantee * is not liable even to that amount, if a bill be given for a larger sum (m).

In an action upon a guaranty of the price of goods to be paid by a bill, the notice of the non-payment of the bill must be given both to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due (n); but where A. became bound to B. for the

(i) Per Ld. Ellenborough, C. J. *Bacon v. Chesney*, 1 Starkie's C. 192.

(k) Ibid.

(l) *Bulkeley v. Lord*, 2 Starkie's C. 406.

(m) *Philips v. Astling*, 2 Taunt. 206. *Supra*, p. 258.

(n) Ibid. But where the defendant who guaranteed the payment of the bill, had notice of the insolvency of the principal before the bill

(1) [*Beekman v. Hale*, 17 Johns. 134. S. P. It is the duty of a party who gives credit to another, on the responsibility or undertaking of a third person, immediately to give notice to the latter of the extent of his engagements. *Russell v. Clark's Ex'ors*, 7 Cranch, 69. And if notice be not given within a reasonable time, he is discharged from all liability. *Cremer v. Higginson & al.* 1 Mason's Rep. 323. *Russell v. Perkins*, *ibid.* 371. See also *Stafford v. Low*, 16 Johns. 67. Where A. wrote thus to B.—“Should you be disposed to furnish my brother with such goods as he may call for, from 300 to 500 dollars worth, I will hold myself accountable for the payment, should he not pay you as he shall agree;” it was held that B. could not recover without proving notice to A. of the acceptance of the proposition, the amount of credit given under it, the time and term of payment, &c. *Rapelye v. Bailey*, 3 Conn. Rep. 438.

A guaranty of the notes of A. cannot be applied as a guaranty of the notes of A. & B. *Russell v. Perkins*, *ubi sup.* S. P. *Penoyer v. Watson*, 16 Johns. 100. A letter of credit addressed by mistake to John & Joseph A., and delivered to John & Jeremiah A. will not support an action by the latter for goods furnished by them to the bearer on the faith of the letter of credit. *Grant v. Naylor*, 4 Cranch, 224. If A. address a letter of credit to B. in favor of C., and B. deliver part of the goods himself, and procure other persons to deliver the residue; A. is responsible only for the goods delivered by B.—the interest in such letter not being assignable. *Rebbins v. Bingham*, 4 Johns, 476. S. P. *Walsh v. Bailie*, 10 ib. 180.]

honesty of *C.* who embezzled money, it was held that *B.* might maintain an action on the guaranty, although three years had elapsed without any notice having been given by *B.* to *A.* (*o*), and although *B.* had given credit to *C.* for the amount, the Jury finding that *B.* had not waved the guaranty (*p*). It is to be observed, that this case differs from that where a bill of exchange is given, the defendant being bound not merely to pay the money, in case *C.* did not pay it, but being bound absolutely to pay the deficiency (*q*). It has been held in equity, that if an obligee enlarge the time of payment to a principal he thereby discharges the surety (*r*), but this is no defence at law (*s*).

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* A guarantee on the sale of goods, who has paid the amount after the bankruptcy of the vendee, who had accepted a bill for the amount, need not prove any demand on the vendee as acceptor of the bill previous to the payment by him as guarantee, for the action is not on the bill itself, and the insolvency of the vendee is a *prima facie* warrant to the guarantee to pay the money previous to a demand by the vendor who held the bill. (*t*). * 651

became due, and that the plaintiff would look to him for payment, it was held to be unnecessary to present the bill, or give notice of dishonour. *Holbrow v. Wilkins*, 1 B. & C. 10; see *Stanyard v. Bower*, 5 M. & S. 62.

(*o*) *Peel v. Tatlock*, 1 B. & P. 419. But note, that *A.* was acquainted with the fact from another source. The Jury found that *B.* had not waved the guaranty.

(*p*) *Ibid.*

(*q*) *Ibid.* per Heath, J.

(*r*) *Rees v. Berrington*, 2 Ves. jun. 544. 10 East, 40. See *Surety*.

(*s*) *Trent Navigation Company v. Harley*, 10 East, 34. Where the bond was conditioned that the principal obligor should account and pay over from time to time all such tolls as he should collect for the obligees. The obligees had been guilty of laches in not examining their accounts for eight or nine years, and in not calling on the principal so soon as they might have done. See also *Nares v. Rowles*, 14 East, 510; where it was held that a bond for the collection and payment over of public duties might be put in force against one of the sureties, although he was not apprized of the default of the principal collector in not paying over the duties, nor called on to indemnify until after the dismissal of the principal from his office. And see *Orley v. Young*, 2 H. B. 613.

(*t*) *Warrington v. Furber*, 8 East, 242. 6 Esp. C. 89.

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HAND-WRITING.

Proof of hand-writing.

THE rules which relate to the proof of hand-writing are now so well settled in practice, upon grounds, as it seems, of general convenience, notwithstanding the doubts which formerly prevailed upon this subject, and which are still entertained as a matter of theory and speculation, as to render very few observations necessary in this place. The best evidence to prove the hand-writing in question is that of a witness who actually saw the party write it, such direct evidence can, however, seldom be procured. And, in general, to prove the hand-writing of a person any witness may be called, who has, by sufficient means, acquired such a knowledge of the *general character* of the hand-writing of the party as will enable him to swear, to his *belief*, that the hand-writing in question is the hand-writing of that person (*u*).

Belief.

- * 652 This knowledge of the general character of the * party's hand-writing may have been acquired from having seen him write, although but once (*x*), or if the witness has never seen him write, it is sufficient if he has obtained a knowledge of the character of the hand-writing from a correspondence with the party upon matters of business, or from any other transactions between them, as from having paid bills of exchange according to his written directions, and for which he afterwards accounted. And when letters are sent, directed to a particular person on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose hand-writing it purports to be (*y*). For when letters are so written in the usual and ordinary course of business, it is reasonable to presume that they were really written by the person by whom they purport to have been written, and that they have not been fabricated to answer a particular purpose. In such case, it is obviously essential, that the identity of the correspondent whose letters have been

(*u*) B. N. P. 236. *Ld. Ferrers v. Shirley*, Fitzg. 195. 12 Vin. Ab. 224. pl. 9. *R. v. Hensey*, 1 Burr. 644. [*Titford v. Knox*, 2 Johns Cas. 211. *Jackson v. Van Dusen*, 5 Johns. 144; *Thomas's Lessee v. Horlocker*, 1 Dallas, 14. *Hammond's case*, 2 Greenleaf, 33. *Commonwealth v. Smith*, 6 Serg. & Rawle, 568. *Commissioners of the Poor v. Hanion*, 1 Nott & M'Cord, 554.]

(*x*) *Garrells v. Alexander*, 4 Esp. C. 37.

(*y*) Per *Ld. Kenyon*, *Cary v. Pitt*, Peake's L. E. 105.

received, with the party whose hand-writing is to be proved, should be established, either by the witness who received the letters, or by other reasonable evidence. (1)

In the case of *Lord Ferrers v. Shirley* (z), where the issue was upon the execution of a deed by Lord Ferrers, a witness was called to prove the hand-writing of Cottington, a subscribing witness, who was dead; he stated that his master had held an estate under the late Lord Ferrers, and that he had seen several letters appearing to have been written by Cottington for the rent of the estate; and that his master had told him that they were the letters of Cottington, Earl Ferrers's steward. The Court, in this instance, rejected the witness, because he could not prove the identity of *Cottington(a); but Ld. Raymond said * 653 that it was not necessary in all cases that the witness should have seen the party write, to whose hand he swears; for where there has been a fixed correspondence by letters, and it can be made out that the party writing such letters is the same man that attested the deed, it will enable the witness to swear to that person's hand-writing although he never saw him write. And Page, J. said, if a subscribing

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(z) Fitzg. 195.

(a) Fitzg. 195.

(1) [The hand-writing of a party to a receipt may be proved by a witness who has never seen him write, but who, in the course of dealings with him, has received his notes which he has paid; if the witness swears affirmatively, from his knowledge derived from these facts, that he believes the signature produced to be the proper hand-writing of the party. *Johnson v. Daverne*, 19 Johns. 134.]

A notary public, who has seen much of the party's acknowledged writing, though he has never seen him write, was held competent to prove his signature as an attesting witness to a will. *Duncan v. Beard*, 2 Nott & M'Cord, 400.

The hand-writing of a surveyor to an ancient survey may be proved by a witness who has become acquainted with his hand-writing by inspecting ancient surveys avowedly made by him. *Jackson v. Murray*, Anthon's N. P. 77. See also *Taylor v. Cooke*, post, p. 657, note (m).

In the case of the *State v. Allen*, 1 Ruffins's Rep. 6, it was held that a witness, who has never seen a person write, nor received letters from him, and who has no knowledge of his hand-writing, but what he has derived from receiving bank notes, in the course of business, purporting to be signed by the person, as the president of a bank, and reputed to be genuine, is incompetent to prove his hand-writing, or to prove that a bank note purporting to be signed by him is counterfeit; at least unless the ordinary occupation of the witness renders it probable that he has received and paid large sums, so as to be a skillful judge.

See Ante, p. 585, note (b).]

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witness to a deed live in the West Indies whose hand-writing is to be proved in England, a witness here may swear to his hand by having seen the letter of such person written by him to his correspondent in England, because, under the special circumstances of that case, there is no other way, or at least, the difficulty will be great of proving the hand-writing of such subscribing witness. The Court, in this case, rejected the testimony, not on account of the insufficiency of the evidence to prove the hand-writing to be that of the person who had written the letters demanding rent, but because the identity of that person with Cottington, the attesting witness, had not been made out (b).

* 654 The mere seeing the superscription of letters at the post-office, purporting to have been franked by the party, is not a sufficient foundation for this kind of evidence (c), for the superscription may have been * forged. A witness who swears to his belief of hand-writing must form his judgment from his recollection of the general character of the hand-writing of the party, and not from any extrinsic or collateral circumstances. Mr. Caldecot was allowed to state his belief that the hand-writing was not that of Mr. Mickle, the author of the *Lusiad*, because he was a very correct man in making capital and small letters where such were required; and in the writing produced that correctness was not observed, for the observation arose from the character of the hand-writing itself (d) (1). But in the later case of

(b) But *qu.* whether there was not reasonable evidence of identity. The *identity* of the *hand-writing*, as contained in the letters and attestation, was proved; the question therefore was, whether *Cottington* wrote them.—*Ld. Ferrers* had a steward named *Cottington*, who was dead; letters had been written in his name, demanding rent—it was the steward's duty to demand rent. Surely, then, it is too much to suppose that some stranger had assumed the name of *Cottington*, and acted as steward in writing letters demanding rent, and also attested a deed purporting to have been executed by *Lord Ferrers*, there being a person whose duty it was so to demand rent, and no ground being laid for suspicion or doubt!

(c) *Cary v. Pitt*, *Peake's Ev.* 105. And see *Ld. Ferrers v. Shirley*, *Fitz.* 195.

(d) See *Dacosta v. Pym*, *Append. to Peake's L. E.*

(1) [In *Smith v. Fenner*, 1 *Gallison*, 175, upon a question whether an altered word in a will was in the hand-writing of the scribe who drafted it—after witnesses, who were acquainted with his hand-writing, had testified that in their opinion the altered word was not written by him, and grounded their opinion mainly on the manner of forming a particular letter, and the use of double hyphens—other witnesses, who were also acquainted with his hand-writing, were allowed to state, that certain deeds, which they produced to

Dacosta v. Pym (e), the witness saying that the hand-writing was like the plaintiff's, but that he did not think it was his, because the plaintiff was too much a man of the world to sign such an account, *Ld. Kenyon* held that the answer was improper, and that the witness ought to found his opinion upon the character of the hand-writing only. PART
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Where the witness had never seen the defendant (who was sued as the acceptor of a bill of exchange) write his name till after the commencement of the action, and then only for the purpose of showing him the difference between his hand-writing, and that of the acceptance on the bill, his testimony was held to be inadmissible (f).

It is also a rule that evidence by *comparison* of hands is not admissible. By comparison, is now meant a comparison by the *juxta-position* of two writings, in order, by such comparison, to ascertain whether both were written by the same person (g) (1). Here it may be observed, that such evidence as is now deemed to be receivable and legal evi- Comparison
of hands. .

(e) *Ibid.*

(f) 1 Esp. C. 14, 15. *Vide*, 4 Esp. C. 117.

(g) *Brookbald v. Woodley*, Peake's C. 21. n. *Macpherson v. Thoytes*, Peake's C. 20. *Stranger v. Searle*, 1 Esp. C. 14. *Goodtitle v. Braham*, 4 T. R. 497.

the jury, were the hand-writing of the scribe, and contained the peculiarity as to the particular letter and the hyphens observable in the will, and that they had frequently known him to write in this manner. "This," said the court, "is not a mere comparison of hands. The witnesses swear as to facts and peculiarities of hand-writing, and produce the best possible proof of their own accuracy."]

(1) [In Massachusetts and Maine comparison of hands has, by long and invariable usage, become competent evidence. *Homer v. Wallis*, 11 Mass. Rep. 309. *Hammond's case*, 2 Greenleaf, 33.

Whether, in New York, papers admitted to be genuine can be delivered to the jury, to determine, by comparison, the genuineness of the paper in question—*Quære*. *Titford v. Knox*, 2 Johns. Cas. 211: But if a witness have no previous knowledge of the hand, he cannot be permitted to decide on it in court, from a comparison of hands. *ibid.*

In one case, (1 Esp. C. 351) Lord Kenyon allowed the jury to examine papers admitted to be of the party's hand-writing, and to compare them with the writing in question. The same was allowed in one reported case in Connecticut. *The State v. Brunson*, 1 Root, 307. *Sed vide The State v. King*, stated by Mr. Day in a note to *Macpherson v. Thoytes*, Peake's C. 21, where two justices of the Sup. Court (a third dissenting) rejected evidence of this kind. See also Swift's Ev. 29, 30. And at Nisi Prius, in New York, it has been ruled, that after the hand-writing of a party is in evidence, his hand-writing to another instrument may be proved by calling a

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dence of hand-writing, as *distinct from evidence by comparison of hands, seems formerly to have been considered as evidence by comparison of hands, and as inadmissible, at least in criminal cases. In the case of Algernon Sidney (*h*), two of the witnesses who swore to their belief of his hand-writing had *seen* him write. and the third had paid bills purporting to have been indorsed by the defendant. Yet the prisoner in his defence insisted that nothing but *comparison* of hand-writing had been offered in evidence against him. And the statute reversing his attainder, recites that there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet, supposed to be his hand-writing, but which was not proved by any one witness to have been written by him, but that the Jury were directed to believe it by *comparing* it with other writings of his. And in the case of the seven Bishops (*i*), evidence by the witnesses, who swore to their belief of the defendants hand-writing from having seen other letters which had been written by them, was also termed evidence by comparison of hands, and the Court was divided upon the question, whether the evidence was sufficient. It appears, however, that at that time it was the common practice to receive such evidence in civil cases. Powell, J. in the same case observes, "In civil actions, a slender proof is sufficient to make out a man's hand, as by a letter to a tradesman, or a correspond-

(*h*) 3 St. Tr. 802, 35 Car. II.

(*i*) 4 Jac. II, 4 St. Tr. 338.

witness to compare it with that to be proved, and to state his inference to the jury. *Rogers' Adm'r. v. Shaler*, Anthon's N. P. 79.

The Circuit Court of the United States, sitting in Pennsylvania, have decided that hand-writing cannot be proved by comparison of hands. *Martin v. Taylor*, April 1803. *U. States v. Johns*, April 1806. Wharton's Digest, 245. But in the State Court, after evidence has been given in support of a writing, it may be corroborated by comparison with an acknowledged writing of the party. *McCorkle v. Binns*, 5 Binney, 349. And on an indictment for forgery—especially where the writing is found in the prisoner's possession—comparison of hands may be permitted. *Pennsylvania v. McKee*, Addison's Rep. 33.

In South Carolina, comparison of hands is admissible as a circumstance in aid of doubtful proof; but *per se*, and without other proof, it is inadmissible. *Bowman v. Plunkett*, 2 M'Cord, 518.

In Vermont, comparison of hands is not admitted, if there be a subscribing witness to the instrument who can be procured. *Pearl v. Allen*, 1 Tyler, 4.

See note to *R. v. Cator*, at the end of the fourth volume of Mr. Day's edition of Espinasse's Reports, where this subject is elaborately treated.]

ent, or the like, but in criminal matters such as this, if such a proof is allowed, where is the safety of your life, or of any man's life? (k)"

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As to the reason of the rule, which excludes a comparison by *juxta*-position, it has been said that Jurors * may not be able to read, and are therefore incompetent to make the comparison (l). This does not appear to be satisfactory; for if the Jurors cannot read, they may nevertheless receive the evidence of witnesses who are able to make the comparison. It has also been suggested, that if such a comparison were to be allowed, an unfair selection of specimens might be made for the purpose of comparison. This, however, would be open to inquiry and observation, and scarcely seems to be a ground for the total exclusion of such evidence; and, perhaps, after all, the most satisfactory reason is, that if such comparisons were to be allowed it would open the door to the admission of a great deal of collateral evidence, which might branch out into a very inconvenient length. For in every case it would be necessary to go into distinct evidence, to prove each specimen produced to be genuine, and even in support of a particular specimen (if the present rule were to be broken through) evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent. The ordinary practice is seldom attended with inconvenience; for if the hand-writing be not that of the party, it is more easy for him to disprove it than it would be for his adversary to prove it in case it were genuine; for it must be within his own peculiar knowledge what witnesses have so intimate an acquaintance with his hand-writing as to be able to prove the forgery; but where it is genuine his adversary has the witnesses to seek for. It cannot, however, be denied, that, abstractedly, a witness is more likely to form a correct judgment as to the identity of hand-writing, by comparing it critically and minutely with a fair and genuine specimen of the party's hand-writing, than he would * be able to * 657 make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention.

In some instances, where the antiquity of the writing makes it impossible for any living witness to swear that he

(k) 4 St. Tr. 338.

(l) *Macpherson v. Thoytes*, Peake's C. 20. *Brookbard v. Woodley*, Ib. in not. Phill. on Ev. 428.

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Comparison of
hands. When
admissible.

ever saw the party write, comparison of hand-writing with documents known to be in his hand-writing has been admitted (*m*).

In the case of *Goodtitle d. Revett v. Braham* (*n*), a clerk from the post-office, who had been employed to inspect franks and detect forgeries, was admitted on a trial at bar to give his opinion, as a matter of skill and judgment, whether a will was written in a natural or imitated character. He admitted in his examination that he had never detected an imitation of the hand-writing of an old person who wrote with difficulty, and who might be supposed frequently to stop; and that he judged principally by seeing whether the letters were what is called painted, or passed over by the pen a second time, which might happen to any person from a failure of ink. After giving it as his opinion that the will was not genuine, a paper was produced, admitted to have been written by the person suspected of having forged the will, and he was asked his opinion whether that paper and the will had been written by the same person, and the question was objected to, but admitted by the Court (1). But, in the case of *Cary v. Pitt* (*o*), *Ld. Kenyon* refused to admit the testimony of an inspector of franks at the post-office, to prove that the hand-writing of the acceptance of a bill of exchange purporting to be the defendant's, was genuine; saying, that although such
* 658 * evidence had been received in the case of *Goodtitle d. Revett v. Braham* (*p*), yet, that in his charge to the Jury he had laid no stress upon it. And in the case of the *King v. Cator* (*q*), an inspector was admitted to swear that the libel was written in a disguised hand, but he was not allow-

(*m*) By *Le Blanc, J. Roe v. Rawlings*, 7 East, 282. B. N. P. 236. [Anthon's N. P. 98. note (*a*).] In order to authenticate the hand-writings of former rectors, writings alleged to be theirs may be compared with entries in the parish registers, purporting to be their signatures; for as it was their duty to sign them, it is to be presumed that the signatures are in their hand-writing. *Taylor v. Cooke*, 8 Price, 653. [See Ante, p. 652, note (1).]

(*n*) 4 T. R. 497.

(*o*) *Peake's L. E. Append.*

(*p*) 4 T. R. 497.

(*q*) 4 Esp. C. 117.

(1) [In *Abbee v. Daniels*, Worcester County (Mass.) Sept. Term, 1811, *Parsons, C. J.* admitted skilful witnesses, who had never seen the defendant write, to swear that the signature in dispute was not, in their opinion, a natural one, nor written by the same person who made other signatures which were produced and acknowledged to be the defendant's.]

ed to give his opinion upon a comparison of the libel with another writing, whether they had been written by the same person (*v*).

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The same rules which apply to the proof of hand-writing in civil, apply also to the case of criminal proceedings (*r*), although, formerly, the rule in criminal cases was more rigid than in civil actions (*s*).

Comparison of
hands.

HEIR.

For proof of the fact that *A.* is the heir at law of *B.* see *Proof of heir-tit. Pedigree.* For proof of his title, see *Copyhold—Ejectment.*—Of his Competency, see *Interest.*

Where a plaintiff sues as heir, he must set out and prove his pedigree, if it be put in issue, for the fact lies within his knowledge; but where he is sued as heir, he is charged generally, and it is sufficient to prove in general that he is heir (*t*).

• Where the defendant is charged generally as assignee on a covenant of his ancestors, which runs with the land, proof that he is heir will support the averment (*u*).

* In an action of covenant for quiet enjoyment under a lease by the defendant's ancestor, the declaration alleged that the reversion came to and vested in the defendant by assignment thereof; the defendant pleaded by his guardian, that the reversion did not come to and vest in him *modo et forma, &c.* The plaintiff proved that the estate descended to the defendant, an infant, as heir at law to the lessor; and that a person had been employed by the defendant's mother to receive the rents, and had given receipts for the same to the plaintiffs as tenants of her son, * 659

(*v*) The opinion of inspectors of franks at the post office, whether a writing is written in a natural or imitated character, is of little weight, and the Court of B. R. refused a new trial which was moved for on the ground that such evidence had been rejected. *Gurney v. Longlands*, 5 B. & A. 330.

(*r*) *Francia's case*, 6 St. Tr. 70. • *Layer's case*, Ibid. 275. *R. v. Hensey*, 1 Burr. 644. *Ld. Preston's case*, 4 St. Tr. 446. *De la Motte's case*, Howell's St. Tr. Vol. 21, p. 810. *The Attorney General v. Le Merchant*, B. N. P. 236. *R. v. Cator*, 4 Esp. R. 117.

(*s*) Per Kelyng, *C. J. Carr's case*; and 4 St. Tr. 338.

(*t*) *Denham v. Stephenson*, 1 Salk. 355. 6 Mod. 241. 2 Will. Saund. 7, note (4). [See *Woodford's heir v. Pendleton*, 1 Hen. & Mun. 303.]

(*u*) *Derisley v. Custance*, 4 T. R. 75. [See *Hamilton v. Wilson*, 4 Johns. 42.]

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IV.Riens per dis-
cent.

* 660

Assets.

and the Court of King's Bench held that the issue was sufficiently proved (x) (1).

In an action against the heir, on the bond of the ancestor (y), the plea of *riens per descent* admits the obligation, but it is incumbent on the plaintiff to prove assets (2). The substance of the issue is, whether the defendant had assets, and a variance as to the county is not material (z); and the plaintiff may show that the land was devised to the defendant, provided the devise does not alter the limitation, for then, according to the general rule, the heir takes by descent (a); and * the charging the estate with debts and legacies makes no difference if the tenure and quality of the estate be not altered (b).

The plaintiff must prove assets according to the averment in the declaration; if he declare against the defendant as heir of the obligor, he must prove assets as the heir of the obligor; for if it appear that the assets have descend-

(x) Ibid. And it was held that the defendant's infancy was not available in that stage of the proceeding.

(y) This will not lie unless the heir be expressly mentioned; *aliter*, of an executor. Co. Litt. 209, a. 2 Will. Saund. 137, b. [Lawrence v. Bucknam, 3 Bibb, 23. Moore v. Fauntleroy, 3 Marsh. 363.]

(z) B. N. P. 175. An allegation of assets in the county A is satisfied by proof of assets in county B. *Deodale's case*, 6 Rep. 47, a.

(a) 1 Ld. Raym. 728. *Reading v. Royston*, 1 Salk. 242. There, H. having two daughters, one of them had a son, and died, and H. devised to the son in fee: and the Court agreed to the rule, that where a devise to an heir gives the same estate which would descend, the devise is unnecessary, and *nihil operatur*; but they held that in the present case the heir must take by devise, for there was not a devise to the heir, since both coparceners made but one heir. See 2 Will. Saund. 7, note (4), where the heir takes a different estate from that which he would have taken by descent, the disposition by the will must prevail, as where the estate is devised to the heir in tail (Plow. 545), or a man devises to his two daughters (Gro. Eliz. 431); but under the stat. 3 Will. & Mary, c. 14. the devise would be fraudulent against creditors, and an action might be brought against the devisee as heir and devisee. 2 Will. Saund. 7, note (4).

(b) *Allam v. Heber*, Str. 1270. B. N. P. 175.

(1) [Equity will give relief against the assets in the hands of the heir, where a cause of action arises, on a covenant of the ancestor, after the settlement of his estate in the probate office, and payment of the surplus to the heir by the administrator. *Booth v. Starr*, 5 Day, 419.]

(2) [See *Jackson v. Roosevelt*, 13 Johns. 97. *Labagh v. Cantine*, *ibid.* 272. *Fisher v. Kay*, 2 Bibb, 434. *Pea v. Waggoner*, 3 Hayw. Tenn. Rep. 3. *Baird & Co. v. Mattox*, 1 Call, 257.]

ed immediately from an intermediate person, the variance will be fatal, the descent ought to have been specially stated (c); as where the defendant is the heir of the heir of the obligor, but is charged as his heir (d). So where the defendant being charged as the heir of B. it appeared that B. died seised, leaving the defendant his daughter, and that his wife was with child of a son, who was born alive, and lived for an hour, for the lands came to the defendant * as heir to her brother who was last seised (e). It is otherwise where the intermediate heirs were not actually seised, for there the defendant takes as heir of the person named (f). The defendant under this issue may give * in evidence an extent against him, on a debt owing by his father on a bond to the king, but he must prove the bond, or an examined copy of it (g). # 661

Riens per dis-
cent.
Assets.

On issue joined on the plea of *riens per discent al temps del original*, the defendant at common law might show that he had aliened the lands *bona fide* before the commencement of the action; but the plaintiff might, under that issue, show that the lands had been aliened by covin (h).

(c) *Jenk's case*, Cro. Car. 151. Lill. Ent. 147. 2 Will. Saund. 7, note. A reversion expectant on an estate-tail is not assets to charge the heir upon the general issue *riens per discent*; but a reversion expectant on an estate-tail for life cannot be pleaded specially (B. N. P. 176. *Kellow v. Roden*, Carth. 126.) It seems that a reversion expectant on a term, or lease for years, cannot be pleaded in delay of execution (2 Will. Saund. 7, note (4). *Buckley v. Nightingale*, 1 Str. 665. 1 Lutw. 442. Herne, 307.) As to what shall be considered as assets by the heir, see 2 Will. Saund. 7, note (4).

(d) Ibid. [See *Waller's Ex'rs. v. Ellis*, 2 Munf. 88.]

(e) 2 Roll. Ab. 709, pl. 62. *Kellow v. Roden*, 3 Mod. 256. 2 Will. Saund. 7, note (4). ◆

(f) Thus, A. being seised in fee, bound himself and his heirs, and having two sons, B. and C., limited the estate to himself for life, remainder to B. his eldest son in tail, reversion to his own right heirs. B. entered and died, leaving D., a son, who died without issue, on whose death the estate-tail became extinct, and the reversion coming into possession, descended on C., A.'s youngest son, who was the heir as well of D. as of A.; held, that B. and D. were seised of the estate-tail only, and that C. was properly charged as heir to his father, and that it was according to the well-known rule of law, sufficient to charge the defendant as heir to him. See Co. Litt. 11, b. 15, a. Carth. 126. *Kellow v. Roden*, 3 Mod. 253. 1 Show. 244. 3 Lev. 286. Bro. Descent, 14—30.

(g) 1 Ld. Raym. 734. B. N. P. 175.

(h) Even before the stat. 13 Eliz. c. 5, which, in this instance, is declaratory of the common law. 1 Roll. Ab. 269. Dyer, 149. 2 Will. Saund. 7, note (4). See also *Gooch's case*, 5 Co. 60. [See *Hammond v. Gaither*, 3 Har. & M'Hen. 218. *Tremble v. Jones*,

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cent.

But under the stat. 3 & 4 Will. & Mary, c. 5, s. 6, the plaintiff to such plea may reply that the defendant had lands, &c. from his ancestor before the original writ brought, or bill filed, and that if upon issue joined thereon it be found for the plaintiff, the Jury shall inquire of the value of the lands, &c. so descended (*i*), (1) and they must, under this statute, find the gross, and not the annual, value (*k*).

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* HIGHWAY.

An indictment for the non-repair of a highway, is, I. either against the inhabitants of a parish, or II. against the inhabitants of some other district; or III. against an individual.

Proof against a
parish.

I. As against a parish, upon the plea of not guilty, it is necessary to prove, 1st, that the road in question is a *highway*, as alleged, within the parish; 2ndly, that it is a *public* highway; 3dly, that it is out of *repair*. For 1st, the liability of the parish to repair all public highways situate within it is a matter of common-law obligation, from which the parish cannot in general discharge itself, except by a special plea, which shows that some other district, or some individual, is liable (*l*), or under some special act of parliament.

Variance.

If the road be improperly described in an indictment or plea, the variance will be fatal; as where a highway lead-

2 Murphey, 579. *Spaight v. Wade*, 1 Car. Law Repos. 284. *Hamilton v. Haynes*, Cam. & Nor. 413. *Graff v. Smith's Adm'ors*, 1 Dallas, 481. *Morris's Lessee v. Smith*, 4 ib. 119. S. C. 1 Yeates, 238.]

(*i*) When the plaintiff replies according to this statute, he is not entitled to a general judgment, as he was at common law, but can recover only to the value of the land sold as found by the Jury (*Redshaw v. Hester*, Carth. 354. Comb. 344. 5 Mod. 119. 122). If the Jury neglect to find the value, the Court will award a *venire de novo*. *Jeffery v. Burrow*, 10 Mod. 18, 19. [S. C. Gilb. Cas. 141. 279.]

(*k*) Carth. 354.

(*l*) 1 Vent. 90. 183. 189. 2 T. R. 106. No agreement with others will discharge the parish (3 East, 86). Where the inhabitants of a township, bound by prescription to repair all the roads within it, were expressly exempted by an act of parliament from the repairing of a new road, it was held that the burthen devolved upon the parish at large. 2 T. R. 106.

(1) [Sed vide *Cohoons v. Purdie*, 3 Call, 431, where a general verdict for the plaintiff (without finding the value of the land) was sustained.]

ing from *A.* to *B.* and communicating with *C.* by means of a cross-road, was described as a road leading from *A.* to *B.* and from thence to *C.* (*m*). But it has been said to be unnecessary to state the *termini* of the highway; and therefore a plea of justification in trespass, stating that a public highway leading from a public highway from *A.* to *B.* in, through, over and along the *locus in quo* to a certain other highway (leading from *C.* to *D.*) was held to be supported by proof that it led from the road from *A.* to *B.* over the *locus in quo*, into another road *E.*, and along that road into the road from *C.* to *D.* (*n*). Variance. * 663

Where the *terminus ad quem* was laid to be a public highway, and it appeared in proof that it was a public footway, it was held that the description was sufficient (*o*). The objection, that the description of the road in the indictment is too general, and is applicable to several other roads, cannot be taken upon the trial under the plea of not guilty, but ought to be taken by a plea in abatement (*p*).

2dly. That it is a public highway.—The proof is either *direct* or *presumptive*; *direct*, as by showing that the highway has been constituted a public one by competent authority, or *presumptive*, by evidence of the use of a road which is of public convenience, by the public, which affords a presumption of their right so to use it as against a private claimant. Proof that it is a public highway.

The proof is *direct* where the road is proved to have been made under some statute or proceeding by writ of *ad quod damnum*. (1).

By the stat. 13 Geo. III, c. 78, s. 19 (*q*), where any highway has been diverted or turned above twelve months, either from necessary or other causes, and new highways, &c. have been made for the benefit of the public, and no suit or prosecution has been commenced for the diverting or turning of the same, the new highway shall from thence-

(*m*) *R. v. Great Canfield*, 6 Esp. C. 136.

(*n*) *Rouse v. Bardin*, 1 H. B. 351, Loughborough, *dissent*.

(*o*) *Allen v. Ormond*, 8 East, 4. But it was said that the description might have been held to be insufficient on special demurrer. See *Sutcliffe v. Greenwood*, 8 Price, 535.

(*p*) *R. v. Inh. of Hammersmith*, 1 Starkie's C. 357.

(*q*) This clause is not repealed by the stat. 55 Geo. III. c. 68.

(1) [See *Colden v. Thurber*, 2 Johns. 424. *Stiles & al. v. Curtis*, 4 Day, 328. *Canaan v. Greenwoods Turnpike Company*, 1 Conn. Rep. 1. *The People v. Lawson*, 17 Johns. 277. *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. 180.]

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way.
Direct evi-
dence.

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forth be the *public* highway to all intents, and persons liable to the repair of the old highway shall also be liable to the repair of the new in the same manner as of the old. This clause, it has been held, is retrospective only (*r*).

* By another clause of the same section (*s*), provisions are made for future diversions of highways, by two justices at special sessions, by the consent of the owner of lands.

It has been held, that in an action of trespass, on issue taken on a plea that the *locus in quo* was a public highway, the legality of an order of justices in ordering the old highway to be stopped up before a new one has been made and put into a proper state, might be questioned, although the order of justices for stopping up the old road had been appealed against and confirmed at the sessions (*t*), and that evidence was admissible to show that a new road, such as the act requires, had not been made previously to the order for stopping up the old road.

Where a highway lies in an open field, and the passengers are accustomed to turn out of the principal track when it is foundurous, these outlets are part of the highway (*u*).

Where a man assigns a road out of his own land, because the highway is foundurous, it does not become a highway till it be so found by writ of *ad quod damnum* (*x*).

Presumptive
evidence.

Or next, The evidence is presumptive, and presumptions are to be derived from the *termini*, and other circumstances of the road itself, and from the use and enjoyment of it by the public.

* 665

It is not essential that the *termini* of the road should * be either market-towns or public roads, provided it be proved that the public are entitled to use it, and that it has been of public convenience. The public may have a right to a

(*r*) *Waite v. Smith*, 8 T. R. 133.

(*s*) This has been repealed by the stat. 55 Geo. III. c. 68, which requires more public notice in such cases, gives greater facility of appeal to the sessions, and gives power to the justices, under certain regulations, to stop up unnecessary highways, &c. See as to the proceedings under this stat. *R. v. Sheppard*, 3 B. & A. 414. The stat. 55 G. 3, c. 68, does not repeal the st. 13 G. 3, c. 78, s. 62; and therefore notice to the justices of holding a special session, at which an order is made, is necessary. *R. v. Justices of Worcestershire*, 2 B. & A. 228.

(*t*) *Welsh v. Nash*, 8 East, 394. As to the form of the order, see *Davidson v. Gill*, 1 East, 64. The stat. as to the residence of the justice within the hundred is merely directory. 8 East, 399.

(*u*) 1 Roll. 390, l. 10.

(*x*) Cro. Car. 267.

road as a common street, although there be no thoroughfare (y), or to a road terminating in a common (z).

So it may be a highway, although it is circuitous (a), and although it is used by the public but occasionally, and although it does not terminate in any town, or in any other public road (b); and on the contrary, it is not necessarily a public highway, although it does lead from one market-town to another, or connect any two points by a line which might be advantageously used by the public, or is used by them under certain restrictions (c).

Evidence to prove a public highway consists usually in showing that the public have used and enjoyed the road; and their actual occupation of it without interruption for a considerable space of time affords a strong presumption of a right to use it, and, as will afterwards appear, a much shorter period of possession will suffice to indicate a right in the public, than to show that a private person has a title to the estate of which he is possessed. (1) The particular manner in * which it has been used, as, where it has been * 666 used for some public purpose, as for conveying materials for the repairs of other highways (d), or upon any occasion likely to attract notice, is very material, for such instances of *user* would naturally awaken the jealousy and opposition of any private owner who was interested in preventing the acquisition of any right by the public, and consequently acquiescence affords a stronger presumption of right than that which results from possession and *user* in ordinary cases. Although the *termini* of a road afford no conclu-

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evidence.
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Enjoyment.

(y) *Rugby Charity v. Merryweather*, 11 East, 375. n. But see *Woods v. Haddon*, 5 Taunt. 125. The plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end of the street for twenty-one years (during nineteen of which the houses had been completed, and the street watched, cleansed, and lighted, and both the footways, and half the causeway, paved, at the expense of the inhabitants) by the defendant's fence. The defendant then pulled down his wall; but it was held that he could not use the highway as a public highway from his own close. [See post. 667, notes (i) and (m).]

(z) *R. v. Wandsworth*, 1 B. & A. 63.

(a) *R. v. Lloyd*, 1 Camp. 261. 3 T. R. 265.

(b) *R. v. Inh. of Wandsworth*, 1 B. & A. 63. [See 7 Johns. 106.]

(c) See 11 East, 376, note (a).

(d) *R. v. Wandsworth*, 1 B. & A. 63.

(1) [A road used as such for forty years, and repaired, is to be considered as regularly laid out, though no record can be found. *Ward v. Folly*, 2 Southard's Rep. 582, See also *Galatian v. Gardner*, 7 Johns. 106. *Todd v. Inhab'ts. of Rome*, 2 Greenleaf, 55.]

- PART IV.** sive evidence as to its being a highway (e), yet the circumstances of its leading from one market-town to another, or from one public road to another, coupled with *user* by the public, and without decisive evidence of interruption and permission by a private owner, are conclusive as to the right of the public (f).
- Presumptions.** Proof of the repair of the road by a parish is strong evidence to show that it is a public highway (g); and evidence of repairs done by a parishioner under an agreement with the parish that he shall therefore be excused, his statute-duty, is virtually evidence of repairs by the parish (h).
- Manner of enjoyment.** The enjoyment and *user* of a road by the public is frequently evidence of a right in the public, although the *user* is of modern date, provided that *user* has been attended with circumstances of *publicity*, from which an acquiescence on the part of the original owner, and a dedication by him of the road to the public, may be inferred. Thus it has been held, that a
- Repairs.** * 667 * permission to the public for the space of eight, or even of six years, to use a street in London, without bar or impediment, is evidence from which a dedication to the public may be inferred (i) (1). So where a court situated on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication to the public was presumed (k). Where a lease was granted of certain ground to be a passage for fifty-six years, evidence of an *user* of the road by the public three or four years after the expiration of the lease was held to be evidence of a gift to the public (l). Presumptions thus derived may be rebutted by proof that the owner did not acquiesce in the use by the public. The acquiescence of a lessee will not

(e) 11 East, 375. n. 1 Camp. 262. The Strand and Covent Garden are connected by a road which, in point of law, is a private road, although constantly used by the public.

(f) 1 Vent. 189.

(g) *R. v. Wandsworth*, 1 B. & A. 63.

(h) *Ibid.*

(i) *Trustees of Rugby Charity v. Merryweather*, cited 11 East, 376. But see *Woodyer v. Haddon*, 5 Taunt. 125; *supra*, 665, note (y). Where a road has been set out under a local act by commissioners, for the use of particular persons, but in fact has been used by the public for many years, this is not, it seems, sufficient evidence of a dedication, without evidence of acquiescence on the part of the parish. *R. v. St. Benedict*, 4 B. & A. 447; *qu. & vide Campbell v. Wilson*, 3 East, 294. See tit. *Bridge*.

(k) *R. v. Lloyd*, 1 Camp. 261. 3 T. R. 265.

(l) *R. v. Hudson*, Str. 909.

(1) See *Ante*, p. 313, note (1).

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bind the reversioner without such evidence of acquiescence on his part as will afford a presumption of a grant by him (*m*). So the erection of a bar upon the road is evidence to rebut the presumption of a dedication to the public (*n*), although the bar has been long broken down (*o*). And although the bar does not exclude foot passengers, no right to a public footway can be presumed, since there cannot, it is said, be a partial abandonment to the public (*p*).

Presumptions.
Time of
enjoyment.

Evidence of reputation is admissible to prove that the way is public (*q*); but evidence of this nature, * arising * *post litem motam*, is not admissible (*r*). So a verdict upon issue taken on a public right of way, and finding it to be such, is afterwards evidence (*s*), although such issue be taken in an action of trespass between private parties, and be offered in evidence to prove the fact between other parties in a civil action (*t*), and the rule applies to all cases of public prescription (*u*).

Reputation.
* 668

II. Upon an indictment against the inhabitants of some other district than a *parish*, or against an individual, the prosecutor, on the plea of "Not guilty," must prove, in addition, the obligation upon the defendants to repair the road, as alleged in the indictment, since it is not founded on a presumption of law (*x*). The obligation in such a case arising from inhabitancy must be *prescriptive* (*y*), and

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obligation.

(*m*) 11 East, 376. And see tit. *Presumption*. Where a way situate in Westminster, which was not a thoroughfare, had been treated as a highway for a century, had been enumerated in a public act as a public street, but had during the whole period been under lease, it was held that the Jury were justified in finding that it was not a public way, inasmuch as there could be no dedication to the public by the tenants for ninety-nine years. *Wood v. Veal*, 5 B. & A. 454, and *qu.* whether there can be public highway which is not a thoroughfare. *Ib.*

(*n*) *Roberts v. Carr*, 1 Camp. 262. *n.* 11 East, 375. *Lethbridge v. Winter*, 1 Camp. 263. *n.* And it has been held that the owner of the soil may replace the bar after it has been broken down twelve years. (*o*) *Ibid.*

(*p*) 1 Camp. 263, *n.*

(*q*) 1 Vent. 189. But an award made under a submission by a tenant for years, as to his liability to repair *ratione tenuræ*, is not evidence against another, for it was made *post litem motam*. *R. v. Cotton*, 3 Camp. 444; & *infra*.

(*r*) *Ibid.*

(*s*) *Reed v. Jackson*, 1 East, 355; *vide* Part II. sec. lxxxiv.

(*t*) *Ibid.*

(*u*) Per Ld. Kenyon, 1 East, 357. See the principles, Part I. sec. xl.

(*x*) *R. v. Marton*, Andr. 276.

(*y*) Doug. 421.

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IV.

 Proof of a
prescriptive
obligation.

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 Of liability *ratione*
tenuræ.

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the inhabitants must plead specially, that some other persons are liable, and upon issue joined upon such an alleged obligation, are bound to prove it. Where, however, the parish is relieved from its obligation by a public act of parliament, it seems that they may take advantage of the statute, under the plea of "Not guilty" (*m*); but unless the act expressly discharge the parish from the burthen of repairs, it will still remain liable, although the act direct that trustees shall take tolls, and apply the money to the repair of the road (*n*). So where the trustees of a turnpike road had repaired the road under the authority of the act for twenty years, it was held that they were not liable to the repair of the road, there being no clause in the act obliging them to repair the road (*o*). So where a township is bound by prescription to repair all the highways within it, it cannot be discharged without showing *by evidence* some persons certain who are bound to repair the road (*p*). But where a township is charged with a prescriptive obligation to repair a particular road, or an individual is charged *ratione tenuræ*, or *ratione clausuræ*, it is sufficient to negative the special charge by proof that some others are liable, without fixing upon whom in certain (*q*).

* 672
Indictment for
obstruction.

* Upon an indictment for obstructing a *public* road or navigable river, the defendant may prove, in answer to the charge, that the obstruction was by accident, and did not arise from intention, or through negligence. Where a barge was sunk by misfortune in a navigable river, it was held that no indictment could be supported for not *removing it* (*r*); so it may be proved that the obstruction arose from the exercise of a right by the defendant, as by the holding of a fair there, after an *usur* of twenty years (*s*).

It has already been seen, that an acquittal upon a former indictment for not repairing a highway is not conclusive evidence, if it be evidence at all, to discharge the defendant (*t*); but that a conviction is usually conclusive as

(*m*) *R. v. St. George's, Hanover Square*, 3 Camp. 222.

(*n*) *R. v. Netherthong*, 2 B. & A. 179.

(*o*) *R. v. The Commissioners of Landilo District, Carmarthenshire*, 2 T. R. 232. An agreement with another that he shall repair a road, does not exempt the parish. 1 Vent. 90. 189. Neither will the King's grant. 3 Mod. 96.

(*p*) *R. v. Inhabitants of Hatfield*, 4 B. & A. 75.

(*q*) *Ibid.*

(*r*) *R. v. Watts*, 2 Esp. C. 675.

(*s*) *R. v. Smith*, 4 Esp. C. 109. 2 Saund. 175, n. 2.

(*t*) Vol. I. p. 223. But yet it has been considered to be such evi-

to the obligation to repair, unless fraud be shown (*u*). Upon an indictment for the non-repair of a road *ratione tenuræ*, it was held, that an award made under a submission by a former tenant of the premises could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation having been made *post litem motam* (*x*).

Where upon an indictment for the non-repair of a road, which lay in two parishes, the obligation was laid to be *ratione tenuræ*, it was held that the inhabitants within the parishes were *not* competent witnesses * on the part of the prosecution (*y*). It has also been held, * 673 that inhabitants of a parish are not competent to give evidence for the parish, although they are so poor as to be excused from the payment of taxes, because, as it is said, although at present they are poor they may become rich (*z*). It may, however, well be doubted whether any inhabitant would not be competent unless he were liable to some duty in respect of the highway in question (*a*). It has been held, upon an indictment against a parish, that a rated inhabitant of another parish, in which the defendants insist-

dence, that upon the *acquittal* of the inhabitants of a parish the Court has suspended the judgment, in order that the case might again be tried without any prejudice from the former verdict. (*R. v. The Inhabitants of Wandsworth*, 1 B. & A. 63.) And *Ld. Ellenborough* said, that to maintain the verdict would be to send the parties to a second trial with a mill-stone about their neck, the weight of which it would be impossible to resist. *Tam qu.* See *R. v. Burdon*, 5 M. & S. 392.

(*u*) *Ibid.* and see *R. v. Wandsworth*, 1 B. & A. 63.

(*x*) *R. v. Cotton*, 3 Camp. 444.

(*y*) *R. v. Buckeridge*, 4 Mod. 48.

(*z*) *R. v. Inhabitants of Hornsey*, 10 Mod. 150.

(*a*) See the stat. 34 Geo. III. c. 74. s. 6. *R. v. Inhabitants of Terrington*, 15 East, 471. *R. v. Kirdford*, 2 East, 559. And tit. *Interest—Inhabitants*. A witness is competent to prove a road to be an highway, although he has agreed to grant, at an annual rent, a way across his own land, which cannot be used unless the disputed road be established. *Pollard v. Scott*, Peake's C. 18.

Upon an indictment against the township of Pilling in the parish of Garstang, charging the inhabitants with the liability to repair all roads within the township, *Holroyd, J.* held that an inhabitant of the adjoining township of Nateby was competent to prove that the road in question which extended through Nateby was a public highway. For although a conviction would discharge the parish, yet it would afford evidence to show that the road was a public one, and so to charge Nateby. *R. v. Inhabitants of Pilling*, Lancaster Summ. Ass. 1823. See also *Vin. Ab. Evidence*, 17, *The Peterborough Bridge case*.

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ed that the highway was situated, was not competent to prove the contrary (b). It seems that the prosecutor is a competent witness, although the court may award costs against him, if the proceeding shall appear to have been vexatious (c).

By the general Highway Act (d) a surveyor of the district is a competent witness, although part of his salary arise from the penalties inflicted by the act; and all inhabitants are competent on the trial for any offence committed against that act (e).

HUNDRED.

General inquiry.

* 674

In an action against the hundred, on the statute of Winton (f), the plaintiff must prove under the general issue, "Not guilty,"—1st, The fact of robbery; 2dly, * his notices; 3dly, His examination; 4thly, His obligation; 5thly, The commencement of the action.

The robbery.

1st. *The robbery of the plaintiff, and the property stolen.* It must appear that the robbery was committed in the day-time, when there was sufficient light (although before sunrise, or after sun-set) for discerning a man's countenance; but, if the robbers begin their attack in the day-time, and oblige a waggoner to drive his waggon out of the high road, it is sufficient, although they do not take any thing till night (g). But by the st. 29 Car. 2. s. 2, c. 7, one who is robbed whilst he is travelling on a Sunday cannot recover; but the prohibition does not extend beyond the case of *travelling*, a party who is robbed in going to church may recover (h). It must also appear that the robbery was within the hundred, or within the division of two hundreds, for then, by the statute, both hundreds are answerable (i); but the parish is not material (k). It is not necessary that

(b) By Bayley, J. at Nottingham, cited 15 East, 474.

(c) See *R. v. Inhabitants of Hammersmith*, 1 Starkie's C. 357; for *semble*, it will not be presumed that the proceeding is frivolous, especially after a bill has been found by a Grand Jury. * So if the indictment has been removed by *certiorari*. See tit. *Interest*.

(d) 13 Geo. III. c. 78, s. 69.

(e) By sec. 14.

(f) 13 Edw. I.

(g) Cro. Jac. 106. 7 Mod. 157. B. N. P. 184. Onslow's N. P. 177.

(h) 1 Str. 406. Com. Rep. 345. B. N. P. 187.

(i) Hut. 125. [See March 11.]

(k) *Shrewsbury v. Hundred of Ashton*, 2 Leon. 174. *Bucknell's case*, Owen, 7.

the robbery should have been committed on the highway (*l*); the case is within the statute if the party be robbed in a coppice (*m*), or in a private way (*n*); otherwise if the party be robbed in his own house, for it is his castle, and he must defend it at his peril (*o*); or even, as it has been held, if the party be taken in the hundred, *A*. and carried into a mansion house in the hundred *B*, and there robbed (*p*); or be taken in the hundred *A*. in the *day-time, and carried into the hundred *B*, and there robbed after it is dark (*q*); but if robbers assault a traveller in the hundred *A*, and he flies into the hundred *B*, where he is pursued and robbed (*r*); or if he be seized in the former hundred, and carried into the latter hundred, and be robbed there in a coppice in the day-time, the latter hundred is liable (*s*). It must also appear that the robbery was done openly, and with violence (*t*).

Proof of the robbery.

* 675

A special property in the party is sufficient to enable him to maintain the action; it may be brought by a servant who is robbed of his master's goods (*u*), but several cannot join, unless they be joint owners of the property stolen (*x*).

2dly, *Notices*. By the st. 27 Eliz. c. 13, s. 11, the party shall not have an action except he shall, with as much convenient speed as may be, give notice and intelligence of the said felony or robbery so committed, unto some of the inhabitants of some town, village or hamlet, near unto the place where such robbery shall be committed.

Proof of notices.

By the stat. 8 Geo. 2, c. 16, s. 1, it is enacted, "That no person shall have or maintain any action against any hundred, &c. unless he shall, over and besides the notice already required to be given of any robbery, with as convenient speed as may be after any robbery on him committed, give notice thereof to one of the constables of the

(*l*) *Cooper v. Hundred of Basingstoke*, 2 Ld. Raym. 826. 2 Salk. 614. 1 Mod. 221.

(*m*) *Ibid*.

(*n*) B. N. P. 184. 7 Mod. 160.

(*o*) 2 Will. Saund. 377, note (7).

(*p*) 2 Ld. Raym. 826. *Semble*, 2 Salk. 614.

(*q*) B. N. P. 184.

(*r*) 2 Salk. 615. B. N. P. 184.

(*s*) B. N. P. 184. 2 Ld. Ray. 826.

(*t*) 2 Ld. Raym. 826. *Semble*, 2 Salk. 614.

(*u*) 2 Will. Saund. 376, a. [Yelv. 162, note (2).]

(*x*) Dy. 370, a. 2 Will. Saund. 377, a.

- PART** hundred, or to some constable (*y*), householder, headbo-
IV. rough, or tithing-man of *some town, parish, village (*o*),
 hamlet or tithing, near unto the place wherein such robbe-
 ry shall happen, or shall leave notice in writing of such
 robbery at the dwelling-house of such constable, headbo-
 rough, house-holder or tithing-man, describing, in such no-
 tice to be given or left as aforesaid, so far as the nature
 and circumstances of the case will admit, the felon or fe-
 lons, and the time and place of the robbery.”
- * 676** Proof of noti- The same statute also further requires, that the party
 ces. shall, within the space of twenty days next after the rob-
 bery committed, cause public notice to be given thereof in
 the London Gazette; therein likewise describing, as far as
 the nature and circumstances of the case will admit, the
 felon or felons (*z*), and the time and place of such robbery,
 together with the goods and effects (*a*) whereof he was
 robbed. This requisite is proved by *the production of
 the Gazette. The omission to insert a full and legal de-
 scription will be fatal (*b*).
- * 677** Notice in the Gazette.
- His 'examina-** 3dly, *His examination on oath*.—The st. 27 Eliz. c. 13, s.
tion on oath. 11, enacts, that no party shall maintain such an action un-

(*y*) These prescriptions of the act have received a liberal construction. It is not necessary that the party should go to the next constable. Where the robbery was at six o'clock in the morning, within two miles and a half of Northampton, and the plaintiff, after recovering his horse, rode to Northampton, where he arrived at seven, giving notice to three persons in the way, and having given notice to an innkeeper there, then gave notice to the high constable three miles from Northampton, between eight and nine, it was held to be sufficient. *Ball v. Hundred of Wymerley*, 2 Str. 1170.

(*o*) Notice to the village next forward on the road is good, although it be in another hundred (Noy, 50. B. N. P. 185), or even county (Cro. Car. 41. B. N. P. 185), and although there was another village nearer, *a latere* in the same hundred; for the word in the act is *near*, and not *nearest*, and five miles have been reckoned sufficiently near.

(*z*) The notice must contain every material description of the robber. Where the highwayman had red eye-brows, it was held to be fatal to omit so-distinguishing a mark. *Whitworth v. Hundred of Grimshoe*, 2 Wils. 113.

(*a*) The numbers and dates of bank-notes, if they be known, or can be ascertained, should be described, as well as the amount (*Chandler v. Hund. of Sunning*, Barnes, 458. B. N. P. 186). It has been doubted whether, if part be well described, but the remainder ill described, as where the dates and numbers of bank-notes are omitted, being known, the plaintiff can recover for so much as is well described; the Court were divided upon the point (*ibid*). In 2 Will. Saund. 376, note (6), it is stated to be the better opinion that the plaintiff cannot recover *pro tanto*.

(*b*) 2 Wils. 113; *supra*, note (*z*).

less he (c) shall within twenty days next before the commencement of the action, be examined on his corporal oath, to be taken before some one justice of the * peace of the county (d), inhabiting within the said hundred where the robbery was committed, or near unto the same (e), whether he knows the parties that committed the said robbery, or any of them (f); and if upon the said examination it be confessed that he knows the parties that committed the said robbery, or any of them, that then he shall, before the said action be commenced, enter into a sufficient bond, by recognizance, before the said justice, before whom the said examination is had, effectually to prosecute the same persons, &c.

* 678

Proof of examination.

(c) The oath must be taken by the party robbed; if the servant be robbed, he must take the oath, although the master bring the action (*Green's case*, Cro. Eliz. 142. 1 Leon. 323. *Raymond v. Hund. of Oking*, Cro. Car. 38. 2 Salk. 613. 2 Will. Saund. 376, a); and if two servants be robbed, both must take the oath (*Ashcombe v. Hund. of Elthorn*, 3 Mod. 288. *Ashcombe v. Hund. of Spelholme*, 1 Show. 94. 241). So, if the servant deliver part of the money to one who travels with him, and the master bring the action, both must take the oath, although one was a Quaker (3 Mod. 288). But if the master bring an action on the robbery of two servants, and one only takes the oath, he may recover *pro tanto* (Carth. 145. 3 Mod. 289. 2 Salk. 613); but if the servant deliver part of the money to another, and bring the action, the servant's oath is sufficient, for the whole was in his possession (*ibid*). So, if the master deliver part to the servant, and they are robbed together, and the master brings the action, it is sufficient if the master alone swear.

In an action under the stat. 52 Geo. III. c. 130, the 4th sect. of which requires that the person or persons seeking to recover damages shall, within four days after notice, &c. give in his or their examination on oath, or the examinations on oath of his or their servant or servants that had the care of his or their erections, buildings, &c. before a justice of peace, &c. whether he or they know the person or persons who committed the fact, it was held that the oath of one of several partners, negating his own knowledge of the offender, but without stating that to the best of his belief the other partners had no knowledge, was insufficient. *Nesham & others v. Armstrong*. 1 B. & A. 146.

(d) But it is said that the justice need not be within the county at the time of administering the oath, for the act is merely ministerial. B. N. P. 186. W. Jones, 239. Cro. Car. 211. 1 Leon. 323. 2 Will. Saund. 376, b.

(e) Where the robbery was committed twenty miles from the residence of the justice, and although many justices lived nearer, Abney, J. on a case reserved, held it to be sufficient, considering the stat. to be directory on that point. *Lake v. Hund. of Croydon, Lent*, 1744. B. N. P. 186.

(f) *Semble*, an oath that he does not know the robber is not sufficient, without adding "or any of them." Noy, 21. Com. Dig. *Hundred*, C. 4.

PART
IV.

Examination.

* 679

It is not necessary that the justice should take the examination in writing (g); and if it be not taken in writing, the justice should be called as a witness to swear to the substance of the examination (h). Where the examination is taken in writing, it must be produced and proved; it is sufficient to show that he who took it acted as a justice (i). The regular taking of the examination before the justice on oath, at the time of the * date, should also be proved by the magistrate, his clerk, or some other person who was present (k); and in such case the justice upon the trial cannot give evidence of any thing else which the plaintiff said on his examination, viz. any description of the robbers or robbery different from that which he shall give at the trial (l). If the party state that he knows the offenders, he should prove, it seems, that he entered into the recognizance required by the statute (m).

Bond.

4thly, The plaintiff must also produce and prove the execution of the bond required by the statute, 8 Geo. II. c. 16, s. 1. (n).

**Commence-
ment of the
action.**

5thly, The plaintiff must produce a copy of the original, to show that the action was commenced within a year next after the robbery was committed (o), as also to prove

(g) B. N. P. 186, cites *Graham v. Hund. of Becontree*, per Wythens; J. Essex. 1683. At all events, the more regular and proper course to take the examination in writing.

(h) Ibid.

(i) Ibid. & *vid. tit. Character*, 373.

(k) In Buller's N. P. 186, it is laid down that it shall be read, on proof that it was delivered by the justice's clerk to the person producing it, without proof of the justice's hand-writing. Per Parker, C. J. at Hertford, 1722.

(l) *Kemp v. Hundred of Stafford*, Trin. 19 Geo. II. C. B. B. N. P. 186.

(m) Noy, 150.

(n) Which requires the party, before the action is commenced, to enter into a bond to the high constable of the hundred in which such robbery shall be committed, in the penal sum of 100*l.*, with two sufficient sureties, to be approved of by the chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, or the sheriff of the said county, with condition for securing to such high constable the due payment of his or their costs, &c.

(o) This is required by the stat. 27 Eliz. c. 13, s. 9. The day of committing the offence is to be included. If a robbery be committed on the 9th of October, the action must at the latest be commenced on the 8th of October next. *Norris v. Hundred of Gawtry*, Hob. 139. 2 Roll. Ab. 520. 1 Brownl. 156. Doug. 465. And see *Price v. Hundred of Chewton*, 1 P. Wms. 437, and *tit. Time*.

that the action was commenced within twenty days next after the examination of the party before * a magistrate (*p*). The *teste* of the original shows the day on which it was issued (*q*).

PART
IV.

* 680

By the stat. 8 Geo. II. c. 16, s. 3, the hundred shall not be liable if one or more of the felons be taken within forty days next after notice in the Gazette (*r*). Evidence, that an inhabitant finding one of the felons in the house, and in the presence of a magistrate, charged him with the robbery before the magistrate, is a sufficient proof of taking, although he was not taken into custody, the magistrate promising that he should be forthcoming at the sessions at the Old Bailey (*s*). It is sufficient if any be taken, although not upon the Hue and Cry, and although the * taking be in a different part of the county (*t*); so it is sufficient if one of the robbers be taken in gaol for another offence, and be indicted of the robbery (*u*), but a taking on suspicion, if he be acquitted, is insufficient (*x*).

Taking one of
the felons.

* 681

It has been said, that it is sufficient if any of the robbers be taken before the commencement of the action, although

(*p*) *Supra*, 677.

(*q*) The practice is to *teste* original writs against hundreds, corporations, heirs, and in several other cases, on the day when the writ is bespoke, although it does not pass the great seal till a subsequent day; and if the writ be bespoke within the year, it is sufficient, although it does not pass the great seal till after the end of the year. *Price v. Hundred of Chewton*, 1 P. Wms. 437.

(*r*) By the stat. of Winton, the hundred was not discharged unless all the felons were taken within forty days (3 Lev. 320, *Pier-son v. Hundred of Westward*. And see 2 Will. Saund. 375, a). By the 27 Eliz. c. 13, it is sufficient if any one of the robbers be taken within that period. But it seems, that although the general issue *not guilty* may be pleaded to a declaration on the stat. of Winton against the hundred (Com. Dig. *Pleader*, S. 11), yet the taking one of the offenders must be specially pleaded in discharge (B. N. P. 187. 2 Will. Saund. 375, a. *Methwin v. Hundred of Thistleworth*, 1 Vent. 118. S. C. 2 Lev. 4. Co. Ent. 348, 9. And see *Baskerville v. Hundred of Agbridge*, 1 Sid. 11), although the writ is that they have not yet been taken. If the taking were not to be specially pleaded, the defence might operate as a surprize on the plaintiff, for the fact of taking is within the peculiar knowledge of the defendants, it being their duty to raise the hue and cry, and to secure the offenders. In 2 Leonard, 12, the singular but unsuccessful experiment was made of pleading immemorial usage and custom for robberies on Gadshill.

(*s*) *Methwin v. Hundred of Thistleworth*, 1 Vent. 118.

(*t*) 1 Vent. 119. Com. Dig. *Hundred*, C. 4.

(*u*) Com. Dig. *Hundred*, C. 4.

(*x*) *Ibid.* and per Periam, Dyer, 370, a.

PART
IV.

property, of this, possession is *prima facie* evidence. The trustee even of a satisfied term, in whom the legal estate is vested, is entitled to recover (*n*).

* 684 * It is not necessary under the stat. 1 Geo. I. to prove that twelve rioters were assembled (*o*). In an action on the stat. 57 Geo. III. c. 19, s. 38, it is not necessary to prove that the object of the mob was seditious (*p*). It would be proper to show that the action had been commenced within twelve months after the injury (*q*).

Proof in an action under the Black Act.

In an action on the stat. 9 Geo. I. c. 22, s. 2, to recover damages from the hundred for an injury, by maliciously killing cattle, destroying trees, setting fire to houses, stacks of corn, &c. the plaintiff must prove that the fact was unlawfully and maliciously done according to the terms of the statute (*r*).

Notice.

2dly. He must prove, that he by himself, or his servant, gave notice of the damage, within two days after the offence, to some of the inhabitants of some town, village, or hamlet near unto the place where the fact was committed.

Examination.

3rdly. That within four days (*s*) after the notice he gave in his own examination, or that of his servant or servants that had the care of the house, out-house, &c. before a justice of the peace of the county, or inhabiting within the hundred where the fact happened, or near to the same, whether he *knew* (*t*) the person

(*n*) *Pritchett v. Waldron & another*, 5 T. R. 14.

(*o*) For although in the 1st and 3d sections the number twelve is particularly mentioned as descriptive of the offence, it is omitted in the 4th section, which creates the felony by riotous demolition, &c. and also in the 6th section, which gives the remedy. 5 T. R. 14.

(*p*) *Clarke v. Burdett, & another*, 2 Starkie's C. 504.

(*q*) By the production of the writ, &c. *vide supra*, 679. But *qu*. whether this be necessary, for the limitation in the 8th sect. of stat. 1 Geo. I. st. 2, c. 5, mentions prosecutions only. See 2 Will. Saund. 378, b.

(*r*) After verdict on a declaration, alleging that it was feloniously done, it will be presumed that it was done unlawfully and maliciously. *Allen v. Hundred of Kirton*, 3 Wils. 318. 2 Bl. R. 842.

(*s*) Both the two and the four days are, it seems, to be reckoned inclusively. 2 Will. Saund. 378, c. See *Norris v. Hundred of Gawtry*, Hob. 139.

(*t*) To state that he has good reasons to suspect that the fact was done by R. G. and W. L. is not sufficient, for there is a great deal of difference between knowing and suspecting. *King v. Inhabitants of Bishops Sutton*, 2 Str. 1247.

* or persons who committed the fact, or any of them; and if he has confessed that he knew them, or any of them, he ought, it seems, to prove that he entered into the recognition prescribed by the statute. The delivery of the examination to the magistrate previous to the giving notice to the inhabitants is not sufficient (*u*).

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IV.

4thly. He must prove the commencement of the action within a year (*x*). The damages are limited to 200*l*. Commencement of action.

By the terms of the stat. if any one of the offenders shall be apprehended, and lawfully convicted within six months after the offence, the inhabitants shall not be liable.

HUSBAND AND WIFE.

- I. *Evidence in actions by the husband and wife, or one of them*, p. 685.
- II. *In actions against the husband and wife*, p. 691.
- III. *Indictments against them*, p. 704.
- IV. *Competency*, p. 706.

I. *Joint action by the husband and wife*.—In general, when the husband and wife join, the interest of the wife must be alleged in the declaration (*a*), and consequently, * if she has been improperly joined, the defect appears upon the record, and is not matter of proof in defence upon the trial. Actions by husband and wife.
* 686

(*u*) *Fowler v. Hundred of Loningborough*, 1 B. & B. 64.

(*x*) By sec. 10; *vide supra*, 679.

(*a*) 2 Bl. Rep. 1236. Com. Dig. *Pleader*, 2 A. 1. [*Staley v. Bar-kite & ux.* 2 Caines's Rep. 221. And where a bond and warrant of attorney were given to a feme *dum sola*, who afterwards married, the court, upon affidavit of facts, allowed judgment to be entered in favor of *baron and feme*. *Sheble v. Cummin*, 1 Browne's Rep. 253.] She must join in respect of all causes of action which are complete before the marriage (3 Lev. 403. Co. Litt. 351. 7 T. R. 349. Com. Dig. *Baron and Feme*, V.); so in real actions, and actions of waste (1 Bulst. 21. 7 Hen. IV. 15, a. 3 Hen. VI. 53), or personal injury to the wife, by slander or battery, during coverture (Yelv. 89. Noy, 18. 1 Brownl. 205. Cro. Jac. 501. 538. Com. Dig. *Baron and Feme*, V). [*Donaldson v. Maginnes*, 4 Yeates, 127.] She may join wherever there was an inception of the cause of action in her before coverture, although it become complete afterwards, (2 Saund. 47, g. Salk. 114. 2 Lev. 107. Cro. Eliz. 459. Com. Dig. *Baron and Feme*, X). (1) Yet in *detinue*, except for the charter of the wife's inheritance, it is said that the husband must sue alone (B. N. P. 50. 1 Salk. 114.

(1) [As in an action of account for the rents and profits of the wife's land during coverture. *Lewis v. Martin*, 1 Day, 263; though the husband may sue alone. *Chancey v. Strong*, 2 Root, 369.]

PART
IV.Actions by
husband and
wife.

It is unnecessary, unless the defendant deny the marriage by a plea in abatement, to give any evidence of the marriage; it is sufficient to identify the parties; the defendant cannot impeach the marriage by evidence under the general issue (b).

Where the action is brought in respect of an injury done to the wife, as by slander or imprisonment, and consequential damages to the husband are also laid, for which he ought to have sued alone, no evidence ought to be given of such special damage, and the defect will be aided by a special verdict, confining the damages to the detriment to the wife (c). * As, if the declaration allege a battery of

Bac. Ab. tit. *Detinue*, A. But see R. Tem. Hardw. 120),—(1) or where she is the meritorious cause of action; as, where a bond or promissory note is made payable to her (*Philliskirk v. Pluckwell*, 2 M. & S. 393. *Day v. Pasgrave*, cited *ibid.* from Mr. Ford's note. 3 Lev. 403. 2 Mod. 217. Salk. 114. 4 Mod. 156. *Prat v. Taylor*, Cro. Eliz. 61). [*Banks v. Marksberry*, 3 Littell's Rep. 281.] or where an express promise is made to pay money to her for her service, as by the cure of a wound (*Brushford v. Buckingham*, Cro. Jac. 77. 205. *Rose v. Bowler*, 1 H. B. 114. *Weller v. Baker*, 2 Wils. 414), or the husband alone may sue.—(2) Where the action would not survive to the wife, she must not be joined (Com. Dig. *Baron and Feme*, W); as, where words not actionable are spoken of the wife, and occasion special damage to the husband. 1 Salk. 206. 1 Lev. 140. 1 Sid. 246. In an action for use and occupation, the wife may join with her joint-tenant and her husband. P. C. K. B. *Smith v. —*, Mich. 2 G. 4.

(b) *Dickenson & ux. v. Davis*, 1 Str. 480. B. N. P. 20. Cro. Jac. 655. [*Coombs & ux. v. Williams*, 15 Mass. Rep. 243.]

(c) 2 Mod. 66. 2 Lev. 101. 1 Lev. 3. Com. Dig. *Pleader*, C. 87. In *Russel v. Corne* (1 Salk. 119), where, in an action by the husband and wife for the imprisonment of the wife, the declaration alleged, *per quod*, the affairs of the husband remained undone, it was held, according to the report in Salkeld, that the *per quod* was well laid in aggravation; but in Str. 1094, Lee, C. J. said that he had seen a manuscript note of the case in Salkeld, and that Holt, C. J. said that he would not intend that the Judge suffered the husband to give the special damages in evidence. In *Todd v. Redford* (11 Mod. 264), which was an action by the husband and wife for an assault on the wife *per quod*, the husband expended money in her cure, and entire damages were given, it seems to have been held that the verdict might be supported. It

(1) [Husband and wife cannot join in *detinue* for a chattel of the wife, if the husband had actual or constructive possession after the marriage. *Spiers v. Alexander*, 1 Ruffin's Rep. 67. But they must join in *detinue* to recover the wife's chattels, of which she had lost possession *dum sola*. *Crozier v. Gano*, 1 Bibb, 257.]

(2) [Where a bond is given to a feme executrix or administratrix during coverture, styling her executrix, &c. the husband may sue on it alone. *Steward v. Chance*, 2 Penn. Rep. 827.]

both (*d*), or a battery of the wife, and the taking the goods of the husband (*e*), or the imprisonment of the wife, *per quod* the affairs of the husband remained undone (*f*) (1).

PART
IV.

By the husband alone.—If the husband alone bring an action where his wife ought to have joined, as in debt on a bond, or for a chose in action, due to the wife before coverture (*g*), or for a personal wrong done to the wife, either before or during coverture, as by slander or battery of the wife, where the * action is not founded on special and consequential damage to the husband (*h*) the declaration will be bad; but the objection usually appears on the record and does not arise upon the evidence (*i*).

By the husband alone.

* 688

It seems, however, to be clear in principle, that where a special damage results to the husband from an injury to the wife, for which an appropriate action lies for the husband, he cannot recover jointly with the wife. See *Dix v. Brookes*, Str. 61. [See Yelv. 90, note, (1)]

In trespass on the lands of the wife, they may recover in respect of the grass cut and carried away. Cro. Eliz. 96. *Willey v. Hawksmore*, cited in *Weller v. Baker*, 2 Wils. 424.

(*d*) 2 Mod. 66. Com. Dig. *Pleader*, C. 87. Per Powell, J. *Todd v. Redford*, 11 Mod. 264. If husband and wife join for the battery of both, it is wrong; but it may be helped by a verdict separating the damages, and judgment may be given for the damages to the wife, and the writ will abate for the residue. B. N. P. 21. 9 Edw. IV. 51. Cro. Jac. 655. [See March, 47. Style, 129. 6 Mod. 149. *Eber sol v. Krug & ux.* 3 Binney, 555.]

(*e*) Com. Dig. *Pleader*, C. 87. *Dub.* 1 Lev. 3, if the defendant be found not guilty as to the goods.

(*f*) 2 Str. 1094. *Russel v. Corne*, 1 Salk. 119. *Newman v. Smith*, 2 Salk. 642. *Dix v. Brookes*, Str. 61. But see *Todd v. Redford*, 11 Mod. 264.

(*g*) 1 Roll. 347. *Milner v. Milnes*, 3 T. R. 627. 1 Sid. 25.

(*h*) Yelv. 89. Noy, 18. 1 Brownl. 205. 1 Rol. Rep. 360. Cro. Car. 90. Lit. Rep. 285. Com. Dig. *Baron and Feme*, V.

(*i*) See the different cases, Com. Dig. *Baron and Feme*, T. W. X. It seems to be an invariable rule, that the wife must be joined in respect of all causes of action which are complete in the wife before coverture, and which of course will survive to her; but there are several instances in which a cause of action accrues during mar-

(1) [In an action by husband and wife against A. for driving his horse and chaise against the plaintiff's chaise, judgment was arrested because the declaration charged injuries to the damage of the husband only, as the loss of wife's labour, &c. *Barnes & ux. v. Hurd*, 11 Mass. Rep. 59. But in *Lewis v. Babcock*, 18 Johns. 443, the Sup. Court of New York held, that though such a declaration was bad on demurrer, it was good after verdict.

In ejectment by husband and wife, in right of the wife, advantage may be taken on the general issue of the wife's being the wife of another man and not of the plaintiff. *Less. of Lopez v. Mayer & al.*, 1 Yeates, 551.]

PART
IV.

Action by the
husband alone.

* 689

By the hus-
band alone.

Where the husband sues in respect of special damage to himself, in consequence of a personal injury to the wife, or lays the assault upon the wife, or other personal injury to her in aggravation, he is entitled to recover in respect of the damage to himself only, and not for the injury to the wife; for the action for the latter damage would survive to the wife (*k*); but he may allege and prove that in aggravation, in respect of which he cannot maintain another and more appropriate action. Thus, in trespass, for breaking and entering his house, he may allege the assaulting and menacing his wife, servants, * and children in aggravation (*l*), in order to show the enormity of the trespass (*m*). So, it seems, although the contrary has been held (*n*), he may in an action of trespass for breaking and entering his house, give in evidence loss of service, or other consequential damage which has accrued from a trespass on his wife or daughter (*o*).

In an action by the husband alone, in respect of consequential damage from a trespass against the wife, it is incumbent on the plaintiff to give *prima facie* evidence of marriage, and that the defendant may negative the fact of marriage by a plea in bar, or by evidence under the general issue.

The husband may maintain an action in his own name

riage, and which would survive to the wife, and where the husband may sue alone, as in the case of a bond or promissory-note given to the wife during coverture. *Supra*, 687; *Howel v. Main*, 3 Lev. 403.

(*k*) *Dix v. Brookes*, Str. 61, where the plaintiff declared for breaking and entering his house, and assaulting his wife; and the Court, on motion in arrest of judgment, said that the plaintiff might join that in his declaration to aggravate damages for which he could not singly recover, and for which the party injured might have a separate action, as in the common case of beating a servant *per quod servitium amovit*. [See Yelv. 90, note (1).]

In *Newman v. Smith*, (Salk. 642), it was held that the plaintiff might allege the beating of his daughter (in an action of trespass, *q. c. f.*) in aggravation of damages, although the loss of service could not be given in evidence, because for that he had an appropriate action; and that he might in such an action recover also for a personal injury to himself.

The husband may sue alone on a covenant to husband and wife in respect of the wife's land. *Arnold v. Revoult*, 1 B. & B. 443. See *Beaver v. Lane*, 2 Mod. 217.

(*l*) *Newman v. Smith*, Salk. 642: *Dix v. Brookes*, Str. 61.

(*m*) Ibid.

(*n*) Ibid.

(*o*) *Bennett v. Alcott*, 2 T. R. 166.

for the service or labour of his wife (*p*); and if he bring such an action in respect of earnings during cohabitation, it is no answer to show that she was previously married to another who is still living, for she may be considered as servant to the plaintiff (*q*). In such an action, it seems that an admission by the wife, such as a receipt given by her, is not evidence (*r*); unless, perhaps, there be some evidence to show that the husband had constituted her his agent for that purpose (*s*).

Action by the wife.—The wife cannot sue without the husband (*t*), (1) but if she alone bring an action, where she has a right of action, the defendant cannot take advantage of her coverture by evidence under the general * issue, it is a personal disability, and must, according to the general rule (*u*) be pleaded in *abatement* (*x*), (2) although the husband may reverse the judgment by writ of error (*y*). But if the

By the wife
alone.

* 690

(*p*) 1 Salk. 114; B. N. P. 136; Cro. Jac. 77. For the promise in law is made to him; but on an express promise to the wife, they may join. Ibid.

(*q*) Per Parker, C. J. Str. 80.

(*r*) Per Lee, C. J. B. N. P. 136.

(*s*) *Supra*, 45.

(*t*) *Marshall v. Rutton*, 8 T. R. 545. Although she lives separately from her husband, and has a separate maintenance secured by deed.—(3) Neither can she be sued alone (ibid.) A feme sole trader, by the custom of London, may be sued, but the husband must be joined for conformity, although execution may be issued against her alone. See *Beard v. Webb*, 2 B. & P. 98. *Langham v. Bewett*, Cro. Car. 68.

(*u*) 3 T. R. 631.

(*x*) Coverture in a woman, whether plaintiff or defendant, must be pleaded in abatement (Com. Dig. tit. *Pleader*, 2 A. 1. *Milner Milnes*, 3 T. R. 627). See *Westbrooke v. Strutville*, (Str. 79), where, in an action for an assault, the defendant proved his marriage with the plaintiff, and she proved in answer her previous marriage to one Westbrooke, who was living at the time of the second marriage; it was insisted that she ought not to give felony in evidence to support her action; but Ld. King admitted it. See B. N. P. 20.

(*y*) 2 Bl. R. 1236. If she marry during the suit, the coverture must be pleaded by plea *puis darrein continuance*. Bac. Ab. *Abatement*, C. *Morgan v. Painter*, 6 T. R. 265.

(1) [The husband of a woman who is guardian in socage must join in actions by her. *Byrne v. Van Hoesen*, 5 Johns. 66.]

(2) [*Newton v. Robison*, 1 Taylor, 72. 2 Hayw. 121. acc. *Gatewood v. Turk*, 3 Bibb, 246, *contra*.]

(3) [In North Carolina, a married woman may file a bill in her own name for a separate maintenance. *Knight v. Knight*, 2 Hayw. 101.]

PART wife alone bring an action where she has no legal cause of
IV. action, it will be a ground of nonsuit at the trial (x). If,
 however, upon the trial, evidence be given of coverture,
 which would, being unanswered, show that the wife herself
 had no cause of action, she may rebut that evidence by
 proof of the husband's civil death, by exile and abjuration
 of the realm (y), or transportation for felony for a term of
 years. (1)

Action by the
 wife alone.

- * 691 * Where a married woman brought an action for goods sold and delivered, and the defendant proved the plaintiff's coverture, and the plaintiff then gave in evidence the record of the husband's conviction for felony, and sentence of transportation for seven years, which term was then expired, it was held at *Nisi Prius* that this was evidence of the husband's abjuration of the realm; and that, if in fact he had returned, the *onus* of proving the contrary, lying on the defendant, the right of action remained (z).

(x) *Cudell v. Shaw*, 4 T. R. 361; where a widow, a feme sole trader in London, brought an action in the Court of K. B. for goods sold and delivered by her whilst she was covert. Mere evidence of an acknowledgment that she was covert has been said to be insufficient. *Wilson v. Mitchell*, 3 Camp. 393.

(y) *Belknap's case*, 2 Hen. IV. 7, a. 1 Hen. IV. 1, a; where the husband was banished to Gascony, there to remain till he attained the King's favour (Co. Litt. 132, b. 133, a; [and Mr. Day's note.] Com. Dig. *Abatement*, E. 6); and where the husband ought to join, and the coverture is pleaded in abatement, this is a good replication. In *Marsh v. Hutchinson* (2 Bos. & Pull. 231,) Ld. Eldon observed, "The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead; so she became entitled to the enjoyment and profits of her own land, though, if he had not been civilly dead, he would have been seised of the lands in her right; and indeed she might have sued for an assault in her own name, and might have been made a defendant without her husband in all cases in which the husband must otherwise have been joined."

(z) In *Carroll v. Blencow*, 4 Esp. C. 27. But see Ld. Eldon's observations in *Marsh v. Hutchinson*, 2 B. & P. 233. In *Sparrow v. Carruthers* (cited in *Corbett v. Poelnitz*, 1 T. R. 7, and 2 Bl. R. 1197), the action was on a note given by a woman, who kept a public-house, for malt supplied to the public-house; plea the general issue; the defence was coverture; the replication in evidence was, that the husband had been transported, and the time not yet expired; and Yates, J. thought that the Court must consider the transportation as suspending her disability. See Ld. Eldon's observations on this case, 2 B. & P. 233; where he says, "A difficulty of equal importance occurs where a wife has contracted debts after the period of her husband's transportation has elapsed, but before his actual return to this country. As far as his (Mr. J. Yates's) opinion can be collected, he seems to have treated it as a material circumstance in evidence, that the time of the transportation was not out."

(1) [Where a feme covert was deserted by her husband in a

After a solemn admission by a woman that she is married to a man, and that the goods in his possession are his goods by the marriage, she will be precluded afterwards, as against creditors, from denying the marriage (a) (1).

PART
IV.

II. *Actions against husband and wife.*—In an action against husband and wife it is sufficient to prove the marriage *de facto*, by evidence of cohabitation, acknowledgment and reputation; for a man who has allowed a woman to pass in the world as his wife shall not afterwards be permitted to say that she * is not so (b). And they cannot prove in * 692 defence that they were not legally married (c).

Actions
against the
husband and
wife.

In an action against the husband and wife, in respect of the contract of the wife previous to the marriage, the defendant may prove under the general issue that she was, at the time of the supposed contract, the wife of another man (d) (2).

Against the husband alone (e).—Although the wife cannot bind the husband by any act or contract of her own, yet he may be affected by them after proof that he gave her authority to act as his agent (f); or by evidence, from

Against the
husband.

(a) *Mace v. Cadell*, Cowp. 232.

(b) *Norwood v. Stevenson*, Andr. 227. Peake's Ev. 377.

(c) Or even plead in bar *ne unques accouple*; for the legality of the marriage is not triable in personal actions, because a husband *de facto* is liable to his wife's debts. Andr. 227.

(d) *Cowley v. Robertson & his wife*, 3 Camp. 438.

(e) The husband and wife must be sued jointly in respect of the debt or contract of the wife before marriage, although the husband state an account, and expressly promises to pay the debt (*Mitchinson v. Hewson*, 7 T. R. 348. Aleyn, 72). The husband may be sued alone for rent due during the coverture, on a lease which the wife has as executrix. Com. Dig. *Baron and Feme*, V. Thom. Ent. 117.

(f) *Supra*, 57, 8. [See *Wallingham's Ex'or. v. Simon's Ex'or.*, 1 Desaussa, 273.]

foreign country, and afterwards maintained herself as a feme sole, and came to this country and resided here five years—the husband being a foreigner and never having been in the United States—she was allowed to sue as a feme sole. *Gregory v. Paul*, 15 Mass. Rep. 31.

Where the husband is banished, the wife is to be considered as a feme sole to all purposes of acquiring property. *Troughton v. Hill*, 2 Hayw. 406. *Wright v. Wright*, 2 Desaussa. 244.]

(1) [A feme covert, suing as sole, cannot, after judgment for the defendant, assign her coverture for error. *Nixon v. Dye*, 1 Coxe's Rep. 217.]

(2) [The husband cannot be sued *alone* for a debt contracted by the wife *dum sola*. *Angel v. Felton*, 8 Johns. 149. Nor as administrator in right of his wife. *Moore v. Suttril*, 1 Hayw. 16.]

PART
IV.

which a previous authority by him, or his subsequent assent can be implied.

Where the wife, without any authority from the husband, contracted with a servant by deed, it was held, that the servant, after the services were performed, might maintain an action of *assumpsit* against the husband according to the terms of the deed (*g*). And if the husband, although not liable in point of law, promise to pay the debt of the wife, he will be bound by it, although it was made under a mistake of the law (*h*).

* 693
Against the
husband for
goods supplied
to the wife.

* Where the action is brought in respect of goods supplied to the wife : 1st. They either cohabit, or 2dly, live apart; and if they live apart, they do so either by mutual consent, or by the default of one without the consent of the other, or by act of law. A presumption arises from *cohabitation*, that the wife has authority from the husband to purchase such articles as are necessary for herself and the family (*i*), unless the contrary appear, and that having been supplied to her they come to his use (*k*).

During coha-
bitation.

This is merely a presumption of fact for the Jury, and is liable to be rebutted by evidence negating the husband's assent to the contract, as by proof of express notice to the plaintiff, or to his servant, that the husband would not be responsible (*l*). Proof by the plaintiff that the articles were consumed in the defendant's family is but presumptive evidence of his assent, and a special verdict for the plaintiff, which does not find the assent of the defendant, is insufficient (*m*). It is a defence for the husband to show

(*g*) *White v. Cuyler*, 6 T. R. 176.

(*h*) *Hornbuckle v. Hornbury*, 2 Starkie's C. 177, Cor. Ellenborough, L. C. J.

(*i*) Bac. Ab. *Baron and Feme*, H. 2 Str. 1122; and per Holt, *Etherington v. Parrott*, 1 Salk. 118.

(*k*) Where the wife took up goods, but pawned them before they had been made into clothes, it was held that the husband was not liable, for they never came to his use (1 Salk. 118, pl. 10); but it would have been otherwise if they had been first made up and worn, and then pawned (*ibid.*) So if the wife pawn her clothes, and afterwards borrow money to redeem them, the husband is not liable. 2 Show. 283.

(*l*) B. N. P. 134, 135. 1 Str. 113. 1 Salk. 118.

(*m*) B. N. P. 136. The case is there assimilated (B. N. P. 134.) to that of credit given to a servant; but a servant has no authority till the master has recognized him as agent by his mode of dealing; a wife, on the other hand, derives her credit from the very nature of the relation accompanied by cohabitation.

If a husband during temporary absences supplies the wife with an allowance for necessaries, the tradesman who knows this, but trusts

that the credit was given not to himself but to the wife, although they lived together, and although the husband saw the wife in possession of the clothes for * the value of which the action is brought (*n*). As where the plaintiff without the privity of the husband, supplied the wife of an apothecary in a small town with dress to the amount of 200*l.*, after the father of the wife had paid a similar bill, and had admonished the plaintiff not to supply her with other goods without the knowledge of the husband (*o*). If the husband rely on notice to the plaintiff not to trust the wife during cohabitation, he must, it seems, prove express notice; it is insufficient to prove a general notice in the *Gazette* or other newspaper (*p*), without further showing that the plaintiff read the paper.

PART
IV.

Against the husband for goods supplied to the wife.
* 694

Where the husband and wife do not cohabit the case is very different. If the husband turn away the wife, he sends credit with her for reasonable expenses (*q*), or, in other words, he lies under a legal obligation to pay the debts which she necessarily incurs (*1*).

Where the husband has turned the wife out of doors.

The case of *Bolton v. Prentice* (*v*) affords a strong illustration of the distinction. The defendant there, had, during the cohabitation, given to the plaintiff (a milliner), express notice not to trust the wife; twelve months afterwards the defendant turned his wife out of doors, and she was furnished by the plaintiff with *apparel suitable to her degree*; and the court, on a motion for a new trial, denied it, saying, that when a man turned away his wife he gave her general credit, and the prohibition was gone and superseded (*r*).

the wife with goods, cannot recover. *Holt v. Brien*, 4 B. & A. 252. It is not necessary that the allowance should be secured by deed. *Ibid*.

(*n*) *Metcalf v. Shaw*, 3 Camp. 22. *Bentley v. Griffin*, 5 Taunt. 356. In the former case *Ld. Ellenborough* nonsuited the plaintiff; in the latter, it was left as a question of fact for the Jury to say to whom the credit had been given.

(*o*) *Metcalf v. Shaw*, 3 Camp. 22.

(*p*) *Bac. Ab. Baron and Feme*, H.

(*q*) B. N. P. 135. (*v*) [2 Stra. 1214—and see Mr. Nolan's note to that case.]

(*r*) B. N. P. 135.

(1) [Where a husband deserted his wife and children, and left her keeping a boarding-house, without furnishing means for her support, and did not return nor make any provision for them; it was held that he was liable for her contracts made in the course of such business—including the rent for such house. *Rotch v. Miles*, 2 Conn. Rep. 638.]

PART
IV.

Against the husband, for goods supplied to the wife. Where they part by mutual consent.

If the husband by ill usage and harsh treatment * compel the wife to leave him, the case is the same as if he had actually turned her out of doors (*s*). But it is said that no ill-treatment short of personal violence, or reasonable fear of it, will enable a stranger to maintain *assumpsit* against the husband for necessaries supplied to her subsequent to her leaving his house (*t*). Where they part by consent, and *no allowance* is made by the husband, the legal obligation on the husband to provide her with necessaries still remains. If in such case an allowance be made, it is to be presumed that she is trusted on her own credit, provided the fact be known that such allowance is made. And then it is not incumbent on the husband to prove personal notice to the plaintiff; it is sufficient if the fact has been notified where the parties lived (*u*). This, it seems, furnishes a reasonable presumption that the plaintiff either did know the fact, or that he might have known it had he made proper inquiries (*x*).

(*s*) Per Ld. Kenyon, *Hodges v. Hodges*, 1 Esp. C. 441.

(*t*) *Horwood v. Heffer*, 3 Taunt. 421. *Liddlow v. Wilmot*, 2 Starke's C. 86.

(*u*) *Todd v. Stokes*, 1 Ld. Raym. 444. 8 Will. III. by Ld. Hale. B. N. P. 135. [*Baker v. Barney*, 8 Johns. 72. *Fenner v. Lewis*, 10 Johns. 38.] The husband lived at Winchester, and on separation by consent, articulated to allow the wife 20*l.* per annum, and she, five years afterwards, contracted the debt with the plaintiff, an apothecary, in London; the husband, it was held, was not liable.

(*x*) It has been said (B. N. P. 135; and by Holt, C. J. in *Todd v. Stokes*, 1 Ld. Raym. 444), that if the debt be contracted by the wife at a distance from the husband's residence, and so soon after the separation that it could not be known at the place where the debt was incurred, the husband will still be liable.

The principle on which the necessity of such a notice rests is not very evident. If the liability of the husband for goods supplied to the wife during separation rested upon a mere *legal obligation*, independently of any assent, or notice of dissent, on the part of the husband (*supra*, 94, *infra*, 700), even express notice would not obstruct the liability, which would depend wholly on the fact whether the husband had or had not supplied the wife with necessaries; if, on the other hand, the liability depended on a presumed authority from the husband, and a contract by him; and it were necessary to prove a previous knowledge of the circumstance of an allowance on the part of the plaintiff, in order to rebut the presumption of such a contract. The reason would equally apply to cases of elopement, and of adultery, where such a notice is unnecessary. See p. 699.

Qu. therefore, whether, where the wife removes to a distance from the husband, who makes her a suitable allowance, it is not incumbent on one who trusts her to make inquiry as to her situation; it is not in the power of the husband to give immediate and effectual notice of the allowance in every place to which the wife may remove immediately after separation, but every one who trusts her may make previous inquiries.

* From what has been said, it follows, that the plaintiff, in an action against the husband for necessaries supplied to the wife, must prove the marriage, either by direct proof, or by evidence of cohabitation and repute, or admissions by the husband; and also, where that is the fact, that the husband turned the wife away. Mere proof of the marriage is *prima facie* evidence of the husband's liability, and it lies upon him to discharge himself by evidence (y). For, although they part by mutual consent, the husband lies under a legal obligation to support the wife, unless she has forfeited her right to maintenance by misconduct, (z), and consequently he is liable for necessaries supplied to her, unless he can show that he himself maintains her, or that she has an adequate provision from some other source (a).

PART
IV.

Against the husband for goods supplied to the wife.

Whether the wife live with or apart from her husband, evidence is essential to show that the goods supplied were necessary and convenient according to the husband's degree and estate in life (b); for it is not to be presumed that he made the wife his agent * beyond that extent where he cohabits with her, nor will * 697 the law impose a larger obligation upon him where they live apart. And regard is to be had to the *estate* of the husband, and not merely to his degree, for one of high degree may be a man of low estate (c). And in the ascertainment of what is suitable to his circumstances, (which is usually a question of fact for the Jury) (d), they are not to be guided by the fortune, brought by the wife, but to regulate their verdict according to the real circumstances of the husband (e).

Where the husband was a common labourer, and after

(y) So ruled in *Car v. King*, 12 Mod. 372.

(z) 2 N. R. 152.

(a) *Vide infra*, 700, 701; and *Liddlow v. Wilmot*, 2 Starkie's C. 86.

(b) B. N. P. 136. *Manby v. Scott*, 1 Lev. 4, 5. 1 Sid. 109.

(c) Per Ld. Hale, in *Manby v. Scott*. Bac. Ab. *Baron and Feme*, H.

(d) Bac. Ab. *Baron and Feme*, H. It has been held that the husband who has turned his wife out of doors is liable for the costs of articles of the peace which are necessary for her safety (*Shepherd v. Mackoul*, 3 Camp. 326). A tradesman who sold lace and silver-fringes for a petticoat and side-saddle, which amounted to 94l., and all within four months, to the wife of a serjeant at law, afterwards a Judge, recovered against him. Skinn. 349. In *Hodgkinson v. Fletcher*, 4 Camp. 70, Lord Ellenborough left the adequacy of the allowance as a fact for the Jury.

(e) Per Ld. Eldon, C. J. *Ewers v. Hutton*, 3 Esp. C. 255.

PART
IV.
Necessaries.

separation the wife worked for her livelihood, *Ld. Holt* held that the money she earned should go to keep her (*f*). There seems to be no satisfactory reason why one who has lent money to the wife (who has been turned out of doors by her husband) in order to provide her with necessaries, should not be entitled to recover it from the husband, for it may happen that she may not be able to procure credit (*g*).

* 698 Where, however, the husband allows the wife to * assume an appearance which he is unable to support, he is answerable for the consequences of the deception, and is liable to pay for articles supplied to the wife corresponding with that appearance, however inconsistent it may be with his circumstances (*h*). And although where they do not cohabit, the husband is liable for necessaries only according to his estate, yet, if he, after separation, be privy to and sanction her appearance in a pretended state of affluence inconsistent with his real circumstances, he would, it seems, be liable just as if the appearances had been real (*i*); and so he is if knowing that his wife has ordered goods which are inconsistent with his fortune, and having the power of returning or countermanding them, he does neither, for then he adopts her act (*k*).

Separation 'by
act of law.

But although in general a husband is not liable where the wife through her own default lives apart from him, yet it is otherwise, in some instances, where the separation is by operation of law; for in such case the wife has not the power to return. And therefore, if the wife be imprisoned for felony, the husband is liable for necessaries (*l*); but it is otherwise if she be kept in an improper place by the co-vin of the gaoler (*m*). So if the husband be imprisoned for any offence it should seem that he would be liable as if he had deserted his wife, for the separation is a consequence of his own fault. Where they are separated *a mensa & thoro* by sentence of the Ecclesiastical Court, she is allow-

(*f*) 1 Salk. 118.

(*g*) See *Harris v. Lee*, 1 P. Wms. 482. The husband gave his wife the foul distemper; she came up to town to be cured, and borrowed money from *A.* to pay the surgeon, and for necessaries; the husband having died, charging his land with debts, it was decreed that *A.* should stand in the place of those who had supplied the necessaries.

(*h*) *Waithman v. Wakefield*, 1 Camp. 120.

(*i*) Ibid.

(*k*) Ibid.

(*l*) *Scott v. Manby*, 1 Sid. 118.

(*m*) *Fowles v. Dinely*, Str. 1122.

ed alimony at the discretion of the Judge, except in case of adultery (*n*) (1).

PART
IV.

* A declaration for provisions supplied to the husband will be supported by evidence of provisions supplied to the wife at his request during his absence (*e*).

* 699

Defence by the husband.

The defendant may prove in answer that the wife eloped from him (*f*) (2), or that since the separation she has lived in a state of adultery, although she did not elope with the adulterer (*g*). And in such cases, notice to the trades-

Elopement.
Adultery.

(*n*) 1 Bl. Comm. 429. See 5 T. R. 679.

(*e*) B. N. P. 136, as decided in *Ross v. Noel*, 31 Geo. II. C. B. on a case reserved. It is added, that it was also said that it would be wrong in the case of a third person; but it seems that there is no difference between the two cases, if the delivery be on the request of the defendant. But see *Ramsden v. Ambrose*, Str. 127. B. N. P. 136. *Harris v. Collins*, *ibid*.

(*f*) B. N. P. 135. *Morris v. Martin*, Str. 647. *Child v. Hardyman*, 2 Str. 875. *Todd v. Stokes*, 1 Ld. Raym. 444. 12 Mod. 244. 1 Salk. 116. *Car v. King*, 12 Mod. 372. In the case of *Manby v. Scott*, 1 Lev. 4, the tradesman trusted the wife after she had gone away, without her husband's consent, and after an express prohibition on his part; and it was held that the husband was not liable (1 Lev. 4. 1 Sid. 109.) The Judges of the Court of K. B. were divided upon the question; but in the Exchequer it was decided in favour of the husband, by eight Judges (one of whom was L. C. B. Hale) against three; but Atkyns, J. one of the eight, differed from the three on the ground of the special prohibition. Proof of prohibition by the husband will not alone be sufficient to discharge him.

(*g*) *Mainwaring v. Sands*, Str. 706. *Gevier v. Hancock*, 6 T. R. 603. Although, when he turned her out of doors, there was no imputation upon her conduct (*ibid*.) But where, after the defendant's wife had committed adultery, he left her in the house with two children bearing his name, and without making any provision for

(1) [In Massachusetts, since st. 1805, c. 57, a wife divorced *a mensa et thoro* may maintain an action against the husband for alimony decreed to her. *Howard v. Howard*, 15 Mass. Rep. 196. And in South Carolina, she may, by *prochein ami*, maintain an action in her own name against a sheriff, for an escape of her husband, committed by attachment for not performing a decree for alimony. *Prather v. Clarke*, 1 Const. Rep. 453.]

(2) [If a wife elope, though not with an adulterer, the husband is not liable for any of her contracts, though made with a person who had no notice of the elopement; but if she offer to return, and he refuse to receive her, his liability is revived from that time, notwithstanding a general notice not to trust her. *M'Cutcher v. M'Gahay*, 11 Johns. 281. And where a third person went to the husband repeatedly, and requested him to let his wife return, which he refused, without questioning the authority by which the request was made, it was held to be tantamount to a personal application by the wife, and that the husband thereafter became liable for necessities furnished to her. *M'Gahay v. Williams*, 12 Johns, 293.]

PART
IV.

Defence by the
husband.
Separate
maintenance.

* 700

man of the fact of elopement, or of the adultery, is immaterial (*h*); for the legal obligation to maintain the wife, which alone *in this case raises the implied promise, ceases. But although the wife elope, yet, if she afterwards solicit to be received, and the husband refuse, the legal obligation revives (*i*). So the husband may show in defence that he allowed a separate maintenance to the wife; but in this case, it has been held to be necessary to show that the tradesman had notice of the separate maintenance (*k*). But it was held by Ld. Holt to be sufficient to show that the fact was notorious in the place where the husband resided (*l*). It is not necessary for the husband to prove that he executed a deed, or even a written instrument, to secure the maintenance to the wife (*m*). But the

her, and she continued to live in a state of adultery, the Court of C. P. held that he was liable for necessaries, in the absence of proof that the plaintiff knew or ought to have known the circumstances. *Norton v. Fazan*, 1 B. & P. 226. [and Mr. Day's note.]

(*h*) Per Raymond, C. J. Str. 706; and Ld. Holt always ruled it so. Per Raymond, C. J. *Morris v. Martin*, Str. 647; and *Child v. Hardyman*, Str. 875.

(*i*) *Rawlins v. Vandyke*, 3 Esp. C. 250, Cor. Ld. Eldon. [Ante, 699, note (1).]

(*k*) Ibid.

(*l*) *Supra*, 695. If the liability of the husband in such case depended on a presumption of authority delegated by him to the wife, such notice would obviously be material for the purpose of negating the presumed authority. But *qu.* whether the liability of the husband, where the wife lives apart, depends upon that principle; if it did, the husband might discharge himself by giving express notice not to trust her, which he cannot do; and it would be no defence to show that the wife had eloped, or lived in adultery, without notice of the fact to the plaintiff. As the liability of the husband in case of separation seems to rest on the legal obligation to maintain the wife, must not (in principle) the implied *assumpsit* cease when the obligation is at an end? In *Durant v. Tilley*, 7 Price, 577, the deed of a husband covenanting with a trustee, for the payment of an annuity to the wife *in case they should live separate*, was held to be void, as being contrary to the policy of marriage. *Secus* where the deed is not prospective, but where the husband covenants, on an agreement to separate, to pay an annuity; *Jee v. Thurlow*, 2 B. & C. 547.

(*m*) *Hodgkinson v. Fletcher*, 4 Camp. 70. But see *Ewers v. Hutton*, 3 Esp. 255; where Ld. Eldon held that a deed of separate maintenance, executed by the husband and wife only, was a nullity; but in that case, it is to be observed, there was no evidence of any actual payment of the maintenance. See also *Barrett v. Booty*, 8 Taunt. 343. The husband showed a deed transferring a large sum to trustees for the benefit of the wife; it was held, that he was further bound to prove that they took possession of it for her benefit.

formal execution of such a deed by the husband and trustee of the wife will be no defence, unless the husband prove that he actually *paid* the allowance (*n*).

* The husband may also show that his wife has separate funds of her own, adequate to her maintenance according to his situation in life; for although she does not derive that provision from him he is not liable except her funds be inadequate (*o*). The adequacy of the allowance, and of the separate funds of the wife, is a question of fact for the Jury (*p*). The receipts of the wife are not evidence to prove that the maintenance has been paid (*q*). It is no defence to show that the defendant was not really married to the woman with whom he cohabits as his wife, even although he can prove that the plaintiff knew the fact; for the implied promise results from the presumption of authority given by the defendant to the wife; and if the defendant treat a woman as his wife in the face of society, the presumption of authority arises independently of the fact of marriage (*r*). But, although the parties have long cohabited as husband and wife, it is, it seems, a good defence where goods are supplied to the supposed wife after separation, to show that she is not in fact the wife of the defendant (*s*). For in case of separation, the implied promise rests, it seems, upon the legal obligation to maintain the wife, and that obligation must be founded on a legal marriage. The husband is not liable, as upon an implied *assumpsit*, to maintain his wife's children by a former husband (*t*). But an implied promise may arise from

* 701

Separate
maintenance.

No marriage.

* 702

(*n*) *Nurse v. Craig*, 2 N. R. 148, by three of the Judges of C. B. Sir J. Mansfield, C. J. *dissent*. This was a strong case: the wife's trustee under the deed, with whom the husband had covenanted to allow her maintenance, brought *assumpsit* for necessities supplied to the wife; and it was held that the action lay, the husband not having paid the stipulated maintenance. [See *Lockwood v. Thomas*, 12 Johns. 248. Ante, p. 695, note (*u*).]

(*o*) *Liddlow v. Wilmot*, 2 Starkie's C. 86, Cor. Ld. Ellenborough. Note, in this case the plaintiff knew that she had resources of her own independent of her husband.

(*p*) 4 Camp. 70. 2 Starkie's C. 86.

(*q*) 4 Camp. 70.

(*r*) *Norwood v. Stevenson*, Andr. 227. *Watson v. Threlkeld*, 2 Esp. C. 637. *Munro v. De Chemant*, 4 Camp. 215; *supra*, 32. But see *Robinson v. Mahon*, 1 Camp. 245.

(*s*) *Munro v. De Chemant*, 4 Camp. 215, Cor. Ld. Ellenborough.

(*t*) *Tubb v. Harrison*, 4 T. R. 118. *Cooper v. Martin*, 4 East, 76. And the husband may maintain an action for the amount of necessities on an express *assumpsit* by such child, made after he has attained his age.

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Defence by the
husband.

Against the
wife alone.

his conduct, as where he adopts the children, receives them into his family, and treats them as part of it, and stands in *loco parentis* (u); even although the contract for necessaries be made by the wife during his absence from home (x).

Where there is a cause of action *against the wife*, as upon her contract before marriage or a tort committed by her during marriage (y), and she is sued alone, the coverture is no defence on the evidence unless it be pleaded in abatement (z).

Where there is no cause of action against the wife by reason of the coverture, she may give the coverture in evidence under the plea of *non est factum*, or of the general issue (a) (1). If she make a demise of her land jointly with her husband, her agreement to the deed after his death will affirm it (b), although there be no re-execution (c), and although the demise be not warranted by the stat. 32 H. VIII. c. 28 (d). And such

(u) *Stone v. Carr*, 3 Esp. C. 1.

(x) *Ibid.* and per *Ld. Ellenborough*, *Cooper v. Martin*, 4 East, 76.

(y) See *Com. Dig. Baron and Feme*, Y; & *supra*, 690.

(z) *Com. Dig. Pleader*, 2 A. 1. *Ibid. Baron and Feme*, F. 2. 3 T. R. 631. And in that case the civil death of the husband by abjuration, transportation, &c. may be replied (*vide infra*, 703, note (i)), or that he is an alien enemy and out of the realm (1 Salk. 118). It is now perfectly settled, that in other cases the husband must be joined, although she is separated from her husband, and has a separate maintenance by deed (*Marshall v. Rutton*, 8 T. R. 545), or live in adultery, and separate from her husband. *Gilchrist v. Brown*, 4 T. R. 766.

(a) B. N. P. 172. *Supra*, 479. *Com. Dig. Baron and Feme*, Q. 12 Mod. 101. 1 Salk. 7. 3 Keb. 228. 2 Str. 1104.

(b) 1 Roll. 149, l. 10, 11. *Com. Dig. Baron and Feme*, S. 1.

(c) *Cowp.* 201.

(d) Which authorizes leases by one of full age seized in right of

(1) [A wife cannot in any case be sued upon a mere personal contract made during the coverture, whether joined with her husband or not, unless he be *civiliter mortuus*, or banished, or transported. *Edwards v. Davis*, 16 Johns. 281. Thus where husband and wife execute a conveyance in which they both covenanted with the grantee, the wife cannot be joined with the husband in an action for breach of the covenant. *Whitbeck v. Cook*, 15 Johns. 483. *Colcord & al. v. Swan & ux.* 7 Mass. Rep. 291. *Parsons v. Plaisted & al.* 13 Mass. Rep. 189. *Pell & ux. v. Pell & ux.* 20 Johns. 126. See *Ela v. Card & al.* 2 N. Hamp. Rep. 176.]

It seems that judgment cannot be entered against husband and wife on a warrant given by the wife *dum sola*. *Anon.* 2 Penn. Rep. 973. See also *Joins v. French*, 2 Halsted's Rep. 27.]

* agreement may be proved by circumstances, as by a re-delivery of the deed (e).

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To evidence of coverture the plaintiff may reply by showing that the husband has abjured the realm, for then, upon the principle of common law, the wife is liable in respect of a cause of action subsequent to such abjuration (f). A temporary absence from the country is not sufficient, although the husband be a *foreigner*, if he returns and pays the debts contracted by the wife, although he again absent himself; but if he absent himself for so long a time that he can no longer be considered as domiciled in this country, the wife will be liable (g). But, it was said, in such a case, that had the husband been an Englishman the *animus revertendi* might, perhaps, be presumed (h). It makes a great difference whether the husband leaving his wife here, and residing abroad, be an Englishman or a foreigner; and there seems to be no instance in which it has been held that the wife of an Englishman who resides abroad is liable (i).

Against the
wife alone.

his wife, or jointly with his wife, of any estate of inheritance made before coverture, or after, by writing indented under seal.

(e) *Goodright v. Straphan*, Cowp. 201.

(f) *Walsford v. Duchess De Pienne*, 2 Esp. C. 554. There seems to be a mistake in the report of this case, either in stating that the coverture was pleaded, or in omitting to state that abjuration was replied.

(g) Ibid. per Ld. Kenyon. Note, the husband left in the year 1793, with the intention of returning; the action was in 1797.

(h) *Franks v. Duchess de la Pienne*, 2 Esp. C. 587. [See *Commonwealth v. Cullins*, 1 Mass. Rep. 116.]

(i) Per Heath, J. in *Marsh v. Hutchinson*, 2 B. & P. 226. An Englishman may be compelled to return at any time by the King's privy seal (ibid.) See *Marsh v. Hutchinson*, 2 B. & P. 226. In that case the husband, an Englishman, had resided in Holland for ten years, and had become possessed of madder-grounds there, from the cultivation of which he derived considerable profit; 3 or 4 years before the action was brought he sent the defendant and his family to England, where his wife resided as a married woman; the husband remained in Holland to look after his madder-grounds, and also in order to recover a situation which he had held as agent for the English packets at the Brill; in case the intercourse between the two countries should be re-established. It was held that the wife was not liable in an action for coals supplied to her under those circumstances.

In the case of *De Gaillon v. Victoire Harel L'Aigle*, (1 B. & P. 357,) where the replication stated that the husband resided abroad, and that the defendant lived separate from him, and traded in this country as a feme sole, and that the plaintiff traded with and gave credit to her as a feme sole, the defendant was held to be liable; but Heath, J. afterwards (1 N. R. 80) said that the decision pro-

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IV.

Indictment
against hus-
band and wife.

* 705

Presumption.
—Coercion.

* III. In general, it seems that a wife may be indicted, even for felony, jointly with the husband (*k*); but if it appear on the evidence, upon an indictment for any felony, except homicide, that the husband was *present* when the offence was committed and acted in the commission of it, the wife, it seems, ought to be acquitted, on the presumption that she acted under the coercion of her husband (*l*). (1) This practice, however, of acquitting the wife in cases of all felonies except murder, seems to have been encouraged out of tenderness to her sex, and in order to obviate the unjustifiable rigour of the law, which would, for the same felony, have saved the husband by admitting him to the benefit of the clergy, whilst the wife must have suffered death (*m*). But, on account of the heinousness of the offence, this doctrine does not extend to cases of murder (*n*), nor to the offence * of homicide in general, nor to that of treason (*o*); neither does it extend to assaults and batteries, (2) or, as it seems, to any other forcible and violent misdemeanors committed jointly by the husband and wife. So she may be convicted jointly with him upon an indictment for keeping a bawdy-house, such offences being, it is said, usually carried on by the intrigues of her sex (*p*). And it seems that the presumption does not arise in any case unless the husband be actually present when the felony is committed (*q*); for then only is she supposed to act under such coercion as will absolve her from the conse-

ceeded much upon the ground that the husband was a foreigner. [See *Gregory v. Paul*, 15 Mass. Rep. 31.]

In the case of *Farrer v. The Countess of Granard*, (1 N. R. 80,) a replication, alleging that the husband resided in Ireland, and that the defendant lived in this country separate from him as a single woman, and as such promised, &c. was held to be bad on demurrer.

(*k*) 1 Hale, 46. 516. Dalt. 104. 22 Edw. IV. 7. But not, it seems, as an accessory in receiving felons.

(*l*) 1 Hale, 44, 5. 1 Bl. Comm. 28.

(*m*) 1 Hale, 46.

(*n*) The Earl and Countess of Somerset were jointly convicted as accessories before the fact to the murder of Sir Thomas Overbury. 1 St. Tr. 351. 1 Hale's P. C. 45.

(*o*) *Arden & Somerville's cases*, 1 And. 104.

(*p*) Haw. B. 1, c. 1, s. 12. 1 Salk. 384.

(*q*) 1 Hale's P. C. 45. Kel. 31.

(1) [*Commonwealth v. Trimmer & al.*, 1 Mass. Rep. 476, in case of larceny. *Martin v. Commonwealth & al.* *ibid.* 391.]

(2) [In *Commonwealth v. Neal & ux.*, 10 Mass. Rep. 152, it was held that a feme covert is not indictable for an assault and battery committed in the company and by the command of her husband.]

quence of her act (*r*). And formerly, it seems, that even in cases of larceny and burglary, both might be convicted of the joint offence (*s*). But in the time of Ld. Hale, it had become the settled practice in such cases to acquit the wife peremptorily (*t*). But Ld. Hale, although he admitted that the practice had prevailed, and approved of it, because it operated in *favorem vite*, was yet very strongly of opinion that it was a mere *prima facie* presumption (*u*). And as the former unreasonable severity of the law with respect to women has been corrected (*x*), it may be doubted whether, at this day, the mere *presence* of the husband furnishes more than a *prima facie* presumption of coercion (*y*). Where a wife commits a felony or other crime in the absence of her husband, although by his command, she is liable to be convicted (*z*). * And she may be convicted as a principal in the felony, and the husband as an accessory before the fact (*v*). * 706

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—Coercion.

If the husband commit felony or treason the wife is not guilty of either in receiving him, for she is *sub potestate viri*, and bound to receive him (*a*); but it is otherwise if the husband in such cases knowingly receive the wife (*b*). And it has been held, that an indictment, charging her jointly with the husband as an accessory after the fact, in receiving felons, is vitious (*c*); for the act is adjudged in law to be entirely the act of the husband (*d*).

IV. The husband and wife cannot be witnesses for each other, for their interests are identical, nor against each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury (*e*). So important is this rule, that the law will not allow it to be violated, even by agreement; the

Competency.

(*r*) But see 27 Ass. 40.

(*s*) Bract. l. 3. c. 32, s. 10. Dalt. c. 104.

(*t*) 1 Hale, 45. And see 2 Edw. III. Corone, 160, *accord*.

(*u*) 1 Hale, 45 & 516.

(*x*) 3 & 4 Will. & Mary, c. 9, s. 5.

(*y*) See *R. v. Hughes*, *supra*, 581.

(*z*) 1 Hale, 45.

(*v*) *R. v. Morris*, 2 Leach, 696, *supra*, 15.

(*a*) 1 Hale, 47.

(*b*) 3 Inst. 108. 1 Hale, 47.

(*c*) *R. v. Dey & ux*. M. 37 E. III. 1 Hale, 47.

(*d*) 1 Hale, 48.

(*e*) 2 Haw. c. 46. 2 Hale, 279. 2 Str. 1095. Co. Litt. 6. 112. 187. [2 Vern. 79.] *Supra*, Vol. I. p. 103.

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wife cannot be examined against her husband, although he consent (*f*); and the principle is further preserved by adhering to the rule, even after the marriage tie has been dissolved by the death of one of the parties, or by a divorce for adultery (*g*). The application of these principles will be considered as they relate to the following classes of cases:

1. Where the husband or wife is a party.
2. Where one of them, not being a party, is interested in the result of a proceeding between others.
- * 707 * 3. Where neither of them is a party to the suit, or interested in the event.

Where one of them is a party.

1. Where either of them is a party the rule seems to be universal, that the other is altogether incompetent in either civil or criminal proceedings. (1) In an action by the plaintiff, as a feme sole, for goods sold and delivered, the husband is not competent to defeat the action by proof of the marriage (*h*).

Upon an indictment for bigamy, the real wife is incompetent; and the second wife is also incompetent until the first marriage has been established (*i*): so in a criminal case the wife is not a competent witness against any co-defendant tried with her husband, if the testimony concern the husband, although it be not given *directly* against the husband (*k*); nor for a co-defendant if the evidence tend to the husband's acquittal, as in the case of conspiracy, where the acquittal of the co-defendant would enure to the acquittal of the husband (*l*); or of an assault, where the cases

(*f*) *Barker v. Dixie*, R. Tem. Hardw. 264; by Ld. Hardwicke.

(*g*) See *Aveson v. Ld. Kinnaird*, 6 East, 192.

(*h*) *Bentley v. Cooke*, cited 2 T. R. 265. 269.

(*i*) *R. v. Griggs*, T. Raym. 1. Co. Lit. 6 b. Gilb. Ev. 252. *R. v. Cliviger*, 2 T. R. 265.

(*k*) 1 Hale, 301. 2 Hale, 201. Dalt. c. 111. 2 T. R. 268. 4 T. R. 678. [*Commonwealth v. Eastland & al.* 1 Mass. Rep. 15.]

(*l*) Per Ld. Ellenborough, *R. Locker & others*, 5 Esp. C. 107. *R. v. Frederick*, Str. 1095. *Supra*, p. 412.

(1) [In the case of *Stanton v. Willson & al.*, 3 Day, 37, a widow, administratrix of her last husband, sued the executors of her first husband, (from whom she was divorced,) in an action of *book debt*, and was held to be a competent witness in support of the charges on book—they having accrued after her divorce, and the last husband being himself, while alive, a competent witness in that form of action—by a statute of Connecticut.]

of the co-defendants cannot be separated (m), (1) and where the wife would be incompetent as a witness, on such grounds, her examination (n) or admission cannot be read (o), or given in evidence, except in cases where she is proved to have been constituted the agent of her husband, and then her acknowledgment or admission stands upon the same ground with that of any other agent (p), * An admission by the wife, even of a trespass committed by herself, is not evidence to affect the husband (q). (2)

* 708

2. Where one of them, not being a party, is interested in the result.—Here there is a distinction between the giving evidence *for*, and giving it *against*, the other. It is an invariable rule that neither of them is a witness for the other who is interested in the result, and that where the husband is disqualified by his interest, the wife is also incompetent (r). Thus the wife of a bankrupt cannot be examined as to the bankruptcy of her husband (s). The husband is an incompetent witness for the wife, where her separate estate is concerned (t). In an action by a trustee for the wife against the sheriff, for taking goods the separate property of the wife, under an execution against the husband, the latter was held to be an incompetent witness for the plaintiff, on the ground of the wife's interest, although he had an interest on the other side, in having the debt satis-

Where one not being a party is interested in the result.

(m) *R. v. Frederick*, Str. 1095.

(n) Hutt. 116. B. N. P. 287. 1 T. R. 69. 1 Burr. 635. 1 Brownl. 47.

(o) 2 Ch. C. 39. B. N. P. 286.

(p) See tit. *Agent*. [See *Supra*, 46. 57.]

(q) *Denn v. White*, 7 T. R. 112. [*Hawkins v. Hatton*, 2 Nott & M'Cord, 374.]

(r) 1 Ld. Raym. 744. 2 Str. 1095.

(s) 1 P. Wms. 610, 611. 12 Vin. Ab. pl. 28. 1 Brownl. 47.

(t) 1 Burr. 424.

(1) [Where two are jointly indicted, but are separately tried, the wife of the defendant not on trial may be a witness on the trial of the other. *The State v. Anthony*, stated Ante, p. 412, note, (2).]

(2) [An acknowledgment by the wife is not sufficient to establish an account against her husband, though it be for articles furnished her before the marriage. *Sheppard's Ex'or. v. Starke & ux.*, 3 Munf. 29. Declarations of a wife, made in the absence of the husband, and affecting his interests, are not evidence, though the wife is party to the suit which is brought to recover land, in which she is jointly interested in her own right. *Lessee of Moody v. Fulmer*, Sup. Ct. of Pennsylvania, June 1814. Wharton's Digest, 249. See post. p. 713, note (o).]

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Where one not
being a party
is interested in
the result.

* 709

Nature of the
interest.

fied by the execution (*u*). Where a carrier brought an action to recover the value of a box belonging to the husband, which had been delivered by a mistake to a wrong person, the wife of the owner of the box was held to be incompetent (*x*). The interest of husband must, in order to disqualify the wife, be *vested and certain; the mere expectation and hope on her part of benefiting her husband, when she gives evidence against an accomplice of the husband (the latter having been convicted) will not destroy her competency (*y*).

On the other hand, where the interest of the husband, consisting in a civil liability, would not have protected him from examination, it seems that the wife must also answer, although the effect may be to subject the husband to an action. This case differs very materially from those where the husband himself could not have been examined, either because he was a party, or because he would criminate himself. The party to whom the testimony of the wife is essential has a legal interest in her evidence; and as he might insist on examining the husband, it would, it seems, be straining the rule of policy too far to deprive him of the benefit of the wife's testimony. In an action for goods sold and delivered, it has been held that the wife of a third person is competent to prove that credit was given to her husband (*z*) (1).

(*u*) *Davis v. Dinwoody*, 4 T. R. 678. The wife was, in fact, the real plaintiff in the action. See *Bland v. Ansley*, 2 N. R. 331.

(*x*) This may be used as an illustration of the rule, although there may be a doubt whether the husband himself would have been incompetent; for in an action against the carrier the record would not have been evidence further than to show that such a trial was had, and such a sum recovered, and the husband must have proved his case *aliunde*. 1 Ld. Raym. 344.

(*y*) *R. v. Rudd, Leach*, 133.

(*z*) B. N. P. 287. *Williams v. Johnson*, Cor. King, C. J. 1 Str. 504.

(1) [In suits in which the husband is not immediately and certainly interested, but may be so eventually, the wife is a competent witness. *Baring v. Reeder*, 1 Hen. & Mun. 154. Thus in trover by A. against B. for goods which had been lent by B. to the wife of C., and conveyed by C. to A., the wife of C. is a competent witness. *ibid*. So in an action on a note given to the wife *dum sola*, and indorsed by her husband, she may be a witness to prove payment of the note before the indorsement. *Fitch v. Hill & ux.*, 11 Mass. Rep. 286.

A second husband, surviving his wife who was administratrix of her first husband, is a competent witness for her surety, in an action on the administration bond. *Wallis v. Britton*, 1 Har. & J. 478. So the husband of the widow of the ancestor of the plaintiff's

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3. Where neither of them is either a party to the suit, or interested in the general result, the husband or wife is, it seems, competent to prove any fact, provided the evidence does not directly criminate the other, or, as it seems, involve the disclosure of some communication made by the other. It has, indeed, been said, that the rule applies to all evidence which tends collaterally, and by its connexion with some other circumstances, to criminate the husband or wife of the witness, although the fact itself, abstractedly considered, involves no criminality, because it may lead to a criminal charge, and to the apprehension of the other (a): and therefore, that if the evidence *tend* to criminate the other it is not admissible (1). * Accordingly, it was held, * 710 in a settlement case, that a witness was not competent to prove her previous marriage with a man who had been removed as the husband of another woman, along with the latter. Here the rule seems to have been carried further than the principle will warrant, such evidence induces no breach of that confidence between married persons which ought to be held sacred; and neither that evidence, nor any decision founded upon it, can be afterwards used against the other party as a proof of the fact.

The position laid down in the case of *The King v. Cliviger*, and which certainly seems to be too extensive and too indefinite, has been materially contradicted in the later case of *The King v. The Inhabitants of All Saints, Worces-*

(a) By Ashhurst & Buller, Js, in *R. v. Cliviger*, 2 T. R. 263.

lessor is a competent witness for the plaintiff in ejectment. *Beatty v. —*, 1 Taylor, 9. In ejectment, the wife of A., the plaintiff's father, was held to be a competent witness to prove the destruction by A. of the will of the plaintiff's grandfather, although she had released her dower in the premises to the defendant who was her husband's grantee. *Wilmot v. Talbot*, 3 Har. & M'Hen. 2: But in ejectment by the children of A. to recover land which had been sold under an order of Orphan's Court, alleged to be void; one who had married the widow of A. was held not to be a competent witness for the plaintiffs, though he had executed a release of all interest of dower or otherwise. *Lessee of Snyder & al. v. Snyder*, 6 Binney, 488.

See *Bolt & al. v. Ballman*, 1 Yeates, 534 *Lessee of Gallagher v. Rogers*, 1 Yeates, 390.]

(1) [In an indictment for a forcible entry, the wife of the prosecutor was allowed by M'Kean, C. J. as a witness to prove the force; but only the force. *Respublica v. Shryber & al.*, 1 Dallas, 68. On an indictment for adultery, the husband of the woman, with whom the crime is alleged to have been committed, cannot be a witness for the prosecution. *The State v. Gardiner*, 1 Root, 485. S. P. *Commonwealth v. Shriver*, Quarter Sessions, Philadelphia, 1820. Wharton's Digest, 265.]

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Where neither
is a party, nor
interested in
the result.

ter, (b). The respondents removed a pauper to the place of her maiden settlement, and produced Ann Willis to prove her own marriage with G. Willis. The appellants objected, on the ground, that they intended to prove the subsequent marriage of G. Willis with the pauper. The sessions received the evidence of Ann Willis, who proved the marriage. The respondents then proved the maiden settlement of the pauper in the appellant parish, and her marriage with G. Willis subsequently to the first marriage (c); the appellants then objected, that the testimony of Ann Willis ought to be struck out. The Court of King's Bench held that the evidence was unobjectionable when received, and could not subsequently be expunged. That the evidence was admissible, since it did not directly criminate the husband, and could not afterwards be used against him, or made the ground-work of any future prosecution. The Court further intimated, contrary to the case *711 of *The King v. Cliviger*, * that the former wife would have been competent to prove the marriage, even although the subsequent marriage had been previously proved.

It follows from the above decision, that the rule laid down by the Court in the case of *The King v. Cliviger*, where it was said that the husband or wife could not be admitted to give any evidence which *tended* to the crimination of the other in collateral cases, was too general.

Although there does not appear to be any express decision on the subject, it seems to be clear in principle that neither party can be examined in a collateral proceeding, as to any matter of confidential communication by the other. Even after a divorce *a vinculo matrimonii*, the woman cannot prove any contract or other matter which arose during the coverture (d) (1).

Wife de facto.

The general rule does not extend to a wife *de facto*, and this is not an exception, but a case which does not fall within the general rule.

Upon an indictment for forcible abduction and marriage

(b) K. B. Easter Term, 1817. 1 Phill. on Ev. 68. 3d. ed.

(c) This proof, it seems, ought properly to have come from the appellants. ♦

(d) *Munroe v. Twisleton*, Peake's Ev. App. lxxxvii.

(1) [In Vermont, a woman divorced *a vinculo* was held (in the case of *The State v. J. N. B.*, 1 Tyler, 36) to be a competent witness against her former husband, on an indictment against him for an offence committed during the coverture: But in a subsequent case, she was held to be incompetent. *The State v. Phelps*, 2 Tyler, 374. See *Supra*, 707, note (1).]

the woman is a competent witness for the Crown. For the marriage being obtained by force has no obligation in law (*d*), and the prisoner cannot take advantage of his own wrong (*e*) (1). So in such a case it is said that she is a competent witness for the prisoner (*f*). It has, however, been said, that if the marriage has been ratified by subsequent voluntary cohabitation, she is not competent either for or against the prisoner (*g*); neither would she be competent unless the force was continuing at the time of the marriage (*h*).

Competency of
wife de facto.

Where a woman was called as a witness for a *man * 712 with whom she had cohabited for several years as his wife, it is said to have been doubted whether she was a competent witness for him, and the court came to no decision upon the point (*i*). In such a case, the fact of marriage seems to be the most simple and convenient, and, indeed, the legal test of competency. It appears to be clear, that the woman would be a competent witness *against* the man, notwithstanding such cohabitation, and that parties living in a state of illicit intercourse could not avail themselves of the benefits and protection which result from a lawful marriage (*k*); but if she would be a competent witness against him, it would certainly be going a great length to hold that she was not also competent for him, and to say, that because he had cohabited with her as his wife, he was to be estopped from disputing the fact where his life was at stake, and debarred from making use of her testimony, when it was essential to his defence. Besides, there

(*d*) Gilb. Ev. 254. *R. v. Fulwood*, Cro. Car. 482. 488. 489. *R. v. Brown*, 1 Hale, 301. 1 Vent. 243. 3 Keb. 193. 5 St. Tr. 6. Rep. Temp. Hardw. 83.

(*e*) 1 Bl. Comm. 444.

(*f*) *R. v. Perry*, Bristol, 1794. 2 Haw. c. 46, s. 79.

(*g*) *R. v. Brown*, 1 Hale, 301. 1 Vent. 243. 3 Keb. 193.

(*h*) Cro. Car. 488. 1 Vent. 243. 4 Mod. 8. 1 Str. 633. 2 Haw. c. 46.

(*i*) *Campbell v. Twenlow*, 1 Price, 81. The case arose upon an arbitration, and the arbitrator had rejected the witness; but as all matters of law, as well as of fact, had been submitted to the arbitrator, his decision was considered to be final.

(*k*) See *Adey's case*, Leach, C. C. L. 245.

(1) [On an indictment for a conspiracy in inveigling a girl, in a state of intoxication, from her mother's house, and procuring the marriage ceremony to be recited between her and one of the defendants, the girl is a competent witness to prove the facts. *Respublica v. Hevice & al.*, 2 Yeates, 114.]

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* 715
Nature of the
crime.

justice to affect the property or liberty of others (a).
* Formerly the infamy of the punishment, as being characteristic of the crime, and not the nature of the crime itself, was the test of incompetency (b); but in modern times immediate reference has been made to the offence itself, since it is the crime and not the punishment which renders the offender unworthy of belief (c) (1). By the common law the punishment of the pillory indicated the *crimen falsi*, and consequently no one who had stood in the pillory could afterwards be a witness (d); but now a person is competent, although he has undergone that punishment for a libel, trespass, or riot (e); and on the other hand, when convicted of an infamous crime, he is incompetent, although his punishment may have been a mere fine.

The crimes which render a person incompetent are treason (f); felony (g), except petit larceny; (by virtue of the provisions of the stat. 31 Geo. III, c. 35); all offences founded in fraud, and which come within the general notion of the *crimen falsi* (h) of the Roman law, as perjury and forgery (i), piracy (k), swindling, cheating (l). So also
* 716 barrety (m), conspiracy, at the *suit of the King (n), præ-

(a) Gilb. L. E. 256. 2 Bulst. 154. Brac. b. 4, c. 19. Fle. b. 4, c. 8.

(b) 2 Haw. c. 46, s. 102. *Pendock v. Mackender*, 2 Wils. 18. Fort. 209. 2 Hale, 277. Co. Litt. 6.

(c) *Pendock v. Mackender*, 2 Wils. 18. Willes, 666. Fortes. 209. 3 Lev. 426, 427. B. N. P. 292. *R. v. Davis*, 5 Mod. 75. *R. v. Ford*, 2 Salk. 690. *Priddle's case*, 2 Leach, 496.

(d) Gil. Ev. 257.

(e) Ibid. Fort. 209. *R. v. Ford*, 2 Salk. 690. B. N. P. 292. *R. v. Crosby*, 10 St. Tr. App.

(f) 5 Mod. 16. 74. Kel. 33.

(g) 2 Bulst. 154. Co. Litt. 6. T. Ray. 369.

(h) *R. v. Priddle*, Leach, 496.

(i) Co. Litt. 6. Fort. 209. And see 5 Eliz. c. 14. 2 Haw. c. 23. c. 43, s. 25. 33 Hen. VI. 55. 2 Hale, 277. Hale's Summ. 263. *Jones v. Mason*, 2 Str. 833. *Walker v. Kearny*, 2 Str. 1148.

(k) 2 Roll. Ab. 886.

(l) Fort. 209.

(m) *R. v. Ford*, 2 Salk. 690.

(n) *R. v. Crosley*, Leach, 349. 33 Hen. VI. 55. 24 Edw. III. 34. 1 Hale, 306. 2 Haw. c. 43, s. 25. 1 Haw. c. 72, s. 9. 2 Hale, 277.

(1) [Before a transported convict can be disqualified from being a witness, evidence must be given that he was transported for some offence made felony or infamous by the common law, or by some statute. *Clarke's Lessee v. Hall*, 2 Har. & M'Hen. 378. See Vol. I. p. 144, note (1). Notes (2) & (3) on next page.]

munire (o) ; the bribing a witness to absent himself from a trial, in order to get rid of his evidence (p) ; so also the judgment on an attain for a false verdict (q) (1) will render the party so convicted incompetent ; so also, as it seems, one who has been convicted of winning money by fraud, or ill practice at certain games, would be disabled by the stat. 9 Anne, c. 14, s. 5, from being a witness, since that statute not only imposes a penalty, but directs that the party shall be deemed infamous (r) (2).

Nature of the
crime.

Co. Litt. 6. Summ. 263. But this, it has been said, is to be understood of a conspiracy to charge a person with a capital offence, in which case, upon conviction, he is liable to the villanous judgment, and to lose the freedom of the law. In a late case it was held in the Ecclesiastical Court, by Sir W. Scott, that a conviction upon an indictment for a conspiracy to commit a fraud, by raising the price of the public funds, did not render the affidavit of the party inadmissible ; but *qu.* whether it would not have that effect in a court of law.

(o) Co. Litt. 6.

(p) *Clancey's case*, Fort. 208.

(q) Co. Litt. 6. 2 Roll. 684.

(r) Fort. 208. In *Crowther v. Hopwood*, 3 Starkie's C. 21, Abbott, C. J. (*dubitanter*) received the testimony of a witness who had been convicted of a conspiracy to raise the price of the public funds by false rumours ; and see the *Case of the Ville de Varsovie*, 2 Dods. Adm. R. 274.

(1) [A conviction upon an indictment for an assault and battery, with intent to kill, in consequence of which the person was sentenced to imprisonment, does not render him an incompetent witness. *United States v. Brockius*, Circuit Court, Oct. 1811. Wharton's Digest, 261.]

(2) [The Supreme Court of Massachusetts, in the case of the *Commonwealth v. Green*, 17 Mass. Rep. 515, have decided that conviction of an infamous offence, and judgment pursuant to it, in a foreign country, or in any other State in the Union, does not render the party an incompetent witness. The court, in this case, said they were not aware that the question as to the competency of a witness convicted in a foreign country "had arisen in the English courts or in any of those of the United States." There are, however, three reported decisions on this subject,—all of them since the American revolution, and one so late as the year 1805. The cases occurred in Maryland, to which part of the Union persons were formerly sent as convicts from G. Britain, under the stat. 4 Geo. I. c. 11, and where, in consequence of their being offered as witnesses, the point became of no small moment to settle. These cases establish the doctrine, in that State, that witnesses thus circumstanced are incompetent. *The State v. Ridgeley*, 2 Har. & M'Hen. 120. *Clarke's Lessee v. Hall*, *ibid.* 378. *Cole's Lessee v. Cole*, 1 Har. & J. 572. (As to the mode of proving the conviction, in these cases, see Vol. I. p. 144, note (1)—and next note.)

The editor trusts that he shall not be charged with impertinence

PART
IV.

Proof of the
conviction.

* 717

II. In order to incapacitate the party, the judgment must be proved (*s*) as pronounced by a court possessing competent jurisdiction (*t*). Proof of the verdict or conviction without the judgment is insufficient, since it may have been quashed on motion in arrest of judgment (*u*). And the judgment must be proved by the record in the usual way (*x*) (3); but it is not material to * show that judgment has been executed (*y*); so it may be shown that the party has been outlawed for treason or felony, since the effect of outlawry in such case is the same with judgment upon a verdict, or by confession (*z*). An admission by the witness himself that he is still confined in prison under a judgment for felony, or that he has committed perjury, or any other offence, will not incapacitate him, although it may discredit him (*a*).

(*s*) *Lee v. Gansel*, Cowp. 1. 2 Salk. 688. 3 Inst. 219.

(*t*) 1 Sid. 51. It must appear from the caption, that the court and jurors had jurisdiction, *Cooke v. Maxwell*, 2 Starkie's C. 183.

(*u*) *R. v. Crosby*, 2 Salk. 688. Holt, 753. 2 Inst. 219. *Lee v. Gansel*, Cowp. 1. 2 Str. 1148.

(*x*) 2 Haw. c. 46, s. 104. 1 St. Tr. 208. 2 St. Tr. 307. 436. 455. 3 St. Tr. 425. 4 St. Tr. 130. Cowp. 1. *Supra*, Vol. I. p. 150. [Not only must infamy be proved by a record, but the objection shall not be heard without a record. Per Parker, C. J. *Commonwealth v. Green*, 17 Mass. Rep. 537. See also *Hills v. Colvin*, 14 Johns. 182. *The People v. Herrick*, 13 ib. 82.]

(*y*) 2 Salk. 689. 3 Inst. 219. 3 Lev. 426. But see Co. Litt. 6. Kel. 37. Hale's Summ. 263. 2 Hale, P. C. 277. 5 Mod. 75, 76.

(*z*) 2 Haw. c. 48, s. 22. 3 Inst. 212. *R. v. Celier*, T. Ray. 369. But outlawry in trespass does not disqualify the party as a witness, although it disqualifies him as a juror. *Withersol's case*, Cro. Car. 134. 147. W. Jones, 198. 1 Hale, P. C. 305. If there be no caption to show that the witness has been convicted by a court of competent jurisdiction, the record is imperfect, and inoperative. *Cooke v. Maxwell*, 2 Starkie's C. 183.

(*a*) *R. v. Watson*, 2 Starkie's C. 116. *R. v. Castell Carcinion*, 8 East, 78. *R. v. Teale*, 11 East, 309.

for suggesting, that hereafter, if crimes greatly multiply in the United States, the question thus differently decided in two ancient and respectable States, will be one of great magnitude and difficulty—and that if contrariant decisions should be made in other States, plaintiffs will, in many cases that may be supposed, resort to some one of the numerous jurisdictions that are open to them in this country, where their principal witness, though a convicted felon, and not to be heard at home, will not only be competent, but also, for aught the defendant can show, *omni exceptione major*.]

(3) [See Vol. I. p. 144, note (1)—that the courts in Maryland have allowed evidence short of the record, and even parol testimony, to prove the conviction of an offender transported to that State from Great Britain.]

III. The objection to competency may be answered, 1st, By proof that the party has been admitted to his clergy, and undergone such punishment as is equivalent to clerical purgation at the common law.—2dly, By proof of pardon; 3dly, By proof of the reversal of the judgment.

PART
IV.

Competency,
how restored.

1st, In order to illustrate this doctrine, a few previous observations will be necessary. Formerly the benefit of clergy was granted indiscriminately to the clergy, and to such laymen as could read; but by the stat. 4 H. 7, c. 13, clergy was to be allowed but once, without the actual production of letters of orders, and all laymen were to be burnt in the hand (*b*). Until the stat. 18 Eliz. c. 7, a felon who was entitled to the benefit of clergy was delivered over to the ordinary to make purgation, that is, to be purged of his offence upon oath, a proceeding which, after a solemn conviction in a court of law, could seldom be accomplished * without the aid of deliberate perjury (*c*); and after he * 718 had been thus purged or acquitted, the party was in all respects a competent witness (*d*). The stat. 18 Eliz. c. 7, abolished the practice of delivering the convicted clerk to the ordinary, but enacted, that upon the allowance of clergy and burning in the hand, he should be enlarged and delivered out of prison, enabling the judge in his discretion to imprison him for a year. Since after this statute competency could no longer be restored by purgation, it was held that the disabilities consequent on conviction were removed by burning in the hand, and delivery out of prison (*e*).

By proof of
admission to
clergy.

And as peers and real clerks had before the statute been entitled to the benefit of purgation, without any burning in the hand, under the stat. 4 H. 7, they were held to be competent after the act of the 18 Eliz. without burning in the hand; peers, after the first conviction, and clerks *toties*

(*b*) This distinction was abolished for a time by the stat. 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3, but was restored virtually by the stat. 1 Edw. VI, c. 12. As to peers and women, *vid. infra*, 719, in the notes.

(*c*) See the remarks on this complication of wickedness, Hob. 291. 3 P. Wms. 448.

(*d*) The convicted clerk was sometimes delivered over *absque purgatione facienda*, on which he was to remain in prison all his life, without the power of acquiring any personal property, or receiving the profits of lands; and to remedy this abuse the statute 18 Eliz. c. 7, was passed.

(*e*) *R. v. Ld. Warwick*, 5 St. Tr. 172. Hob. 292. B. N. P. 292. Kel. 37, 28. 2 Bulst. 154. 2 Haw. c. 33. Sty. 388. Godb. 288. *R. v. Ld. Castlemaine*, 2 St. Tr. 40.

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Competency,
how restored.

* 719

quoties (*f*). With respect to laymen, the burning in the hand operated as a statute pardon (*g*). By the stat. 4 Geo. 1, c. 11, in the case of grand or petit larceny, where the convict is entitled to benefit of clergy, and liable only to the penalties of burning in the hand, or of whipping, the Court before *whom the prisoner is convicted, instead of ordering the offender to be burnt in the hand, or whipped, may direct that he shall be transported to America for the space of seven years (1). And on the conviction of an offender for a crime for which he would be excluded from the benefit of clergy, but to whom mercy is extended on condition of transportation, the Court may allow him the benefit of a pardon under the great seal. And it is prescribed by the same act, s. 2, that where any such offenders shall be transported, and shall have served their respective terms, according to the order of such court, such services shall, to all intents and purposes have the effect of a pardon, as for the crime for which they were so transported (*o*) (2).

By the stat. 19 Geo. 3, c. 74, s. 3, it is directed that fine or whipping may be imposed and inflicted, instead of burning in the hand, in *all clergyable felonies*, except *manslaughter*; and that when imposed or inflicted instead of burning, shall have the like effect and consequences to the party, as to capacities and credits, as if he had been burnt.—The effect, therefore, of these statutes on the common-law doctrine (*h*) of purgation, seems to be this:—If a layman be convicted of a clergyable felony, and be burnt in the hand,

(*f*) 1 Hale, 529. Fost. 356. 2 Hale, 388. 3 P. Wms. 487. 5 Co. 110. *Searle v. Williams*, Hob. 288.

(*g*) 2 Haw. c. 46. B. N. P. 292. *Searle v. Williams*, Hob. 294. T. Raym. 370. 380. Godb. 288. Sty. 388. Kel. 38. 1 Vent. 349. Skinn. 578. 5 Mod. 15. 2 Sid. 51. Hob. 81.

(*o*) One who returns from transportation before the expiration of his term is not restored to his civil rights. *Bullock v. Dodds*, 2 B. & A. 258, under the stat. 8 Geo. 3. c. 15.

(*h*) By the stat. 3 & 4 Will. & Mary, c. 9, s. 5, women are entitled to the benefit of the statute as men are to the benefit of the clergy. By the stat. 5 Ann. c. 6, the necessity of reading was abolished.

(1) [See next note and *Ante*, p. 715, note (1), 716, notes (2) and (3). Vol. I. p. 144, note (1).]

(2) [A person convicted of felony in Great Britain, and sent to Maryland for seven years, is presumed to have served his time out, and thereby become a competent witness, unless the contrary is proved. *Cole's Lessee v. Cole*, 1 Har. & J. 572. See *Supra*, 716, notes (2) and (3).]

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or suffer any punishment inflicted by the above statutes in lieu of it, his competency is restored by the execution of the sentence. If a peer be convicted of such felony, or indeed of some felonies which are not clergyable (*i*); he is entitled to be discharged for the first offence, and retains his competency; and a real clerk remains *competent, although he has committed several clergyable felonies. The mere admission to clergy, where the felon is liable to be burnt in the hand, does not restore competency (*k*); and therefore it is not sufficient to produce the record whereby clergy is granted, *without* proof of burning in the hand (*l*), except in the case of a peer, or a clerk; but it must be further proved that the witness has been burnt in the hand, or that some other punishment authorized by one of the above statutes, has been awarded by the Court in lieu of such burning in the hand, and has been executed. But the king's pardon for burning in the hand has the same effect as burning in the hand would have had (*m*). With respect to petit larceny, since the offender was not obliged to pray his clergy, it followed that his competency could not be restored by clerical purgation, or by the burning in the hand, or other punishment substituted for it; and the inconvenience of this being felt (*n*), the stat. 31 Geo. 3, c. 35 (*o*), enacted, that no witness should be deemed to be incompetent by reason of his conviction of petit larceny.

Competency,
how restored.
* 720

2dly. Next it may be shown that the proposed witness has received a pardon for his offence; 1st, either from the King, under the great seal, or, 2dly, under an act of parliament. (*v*). It has long been settled, notwithstanding doubts upon the subject (*p*), that a pardon, whether

Pardon.

(*i*) By the stat. 1 Edw. VI. c. 12, a peer is to have the benefit of clergy in the same manner as a layman for the first offence, although he cannot read, and without burning, for all offences then clergyable to commoners, and also for housebreaking, highway robbery, horse-stealing, and robbing churches. 2 Hale, 372. Hob. 294. *R. v. Duchess of Kingston*, 11 St. Tr. 198.

(*k*) *Per Curiam*, T. Ray. 380. *Ld. Warwick's case*, 5 St. Tr. 168.

(*l*) *Ld. Warwick's case*, T. Ray. 380. 5 St. Tr. 168. *Burridge's case*, 3 P. Wms. 485. 490. *Searle v. Williams*, Hob. 288. *Armstrong v. Lisle*, Kel. 93.

(*m*) 4 Bl. Comm. 395.

(*n*) See *Pendock v. Mackender*, 2 Wils. 18.

(*o*) And in Ireland, the stat. 36 Geo. III. c. 29.

(*v*) A pardon under the sign manual is not sufficient. *R. v. Beaton*, 1 Bl. Rep. 479.

(*p*) Palm. 412. Latch, 81. *Brown v. Crauchaw*, 2 Bulst. 154. 2 St. Tr. 521. 4 St. Tr. 269. *Ld. Castlemain's case*, 3 St. Tr. 36. 2 Bro. 17.

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IV.

Pardon.

* by the King, under the great seal, or by act of parliament, removes not only the punishment, but also all disabilities consequent upon conviction, and restores the competency of the party as a witness (*q*). (1) And it is reasonable that it should, for otherwise a person might for one fault be for ever excluded as a witness, even after he had, by a long course of good conduct, in some measure regained the character which he had lost. And although neither the King nor the parliament can by a pardon convert a rogue into an honest man, and confer credibility upon one, who through the infamy of his conduct is not credible, yet such a pardon must be presumed to have been conferred, after inquiry, upon good and sufficient grounds, upon an object worthy of the indulgence, and therefore worthy of being heard; but the degree of credit is still to be left to the Jury (*r*).

Competency—
restoration of.

A pardon will restore competency in all cases where the disability is a consequence of the judgment, and not a part of the judgment (*s*). But neither the King's pardon, nor any thing tantamount to it, will, it is said, restore competency where the disability is part of the judgment, and not a consequence of it (*t*). Subject to this limitation, a pardon will restore competency in all cases and at all times, as in cases of conspiracy, perjury and forgery (*u*), although
* 722 the party has undergone an * infamous punishment, as by

(*q*) Gilb. Ev. 260. *R. v. Celier*, T. Ray. 369. *Cuddington v. Wilkins*, Hob. 67. 81. *R. v. Crosby*, 1 Ld. Raym. 39. *R. v. Ld. Castlemain*, T. Ray. 379. *Reilly's case*, Leach, 510. 2 Hale, 278. 1 Brownl. 47. 2 Bulst. 154—6. [*Commonwealth v. Green*, 17 Mass. Rep. 537.]

(*r*) 2 Hale, 278. *R. v. Crosby*, 5 Mod. 15.

(*s*) Per Holt, C. J. 2 Salk. 689. 1 Ld. Ray. 256. 12 Mod. 139. Comb. 459. 2 Salk. 512. Carth. 421. Holt, 535. 5 Mod. 345. 3 Mod. 342. Gilb. Ev. 260. But this was formerly doubted. 1 Brownl. 47. 2 Bulst. 154. 2 Sid. 221. 2 Danv. Ab. 163. Cro. Jac. 662.

(*t*) Per Holt, C. J. 2 Salk. 689. 691.

(*u*) 1 Hale, 306.

(1) [A pardon of one, who had been convicted of forgery and sentenced to the state prison for life, contained a proviso that nothing in the pardon should be construed "so as to relieve the prisoner of and from the legal disabilities to him from the conviction, sentence and imprisonment, other than the said imprisonment:" It was held that this proviso was repugnant to the pardon itself, and must be rejected—and that the party was freed from all legal disabilities. *The People v. Pease*, 3 Johns. Cas. 333. See also *Ex parte Deming*, 10 Johns. 232. 483.]

standing in the pillory for cheating (*x*); and after attainder for treason or felony (*y*). So where he has been convicted of felony in taking a false oath to obtain probate of a will under the stat. 31 Geo. 2, c. 10; so where the pardon is received after conviction, but before judgment (*z*). PART
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Pardon.

It has been held that a *general pardon*, after a conviction for felony, or after an outlawry for felony, will not restore competency (*a*); but it seems that the burning in the hand may be discharged by the King's pardon (*b*). The pardon must be produced under the great seal (*c*). A pardon under the King's sign manual, or privy seal, is insufficient, since the warrant is countermandable (*d*); in case of a conditional pardon, proof must be given that the condition has been performed (*e*) (1).

3dly. By proof of a reversal of the judgment or outlawry by writ of error, which must be proved by the production of the record. Where it was objected that the witness had been attainted by virtue of an act of parliament, for not having surrendered himself before a particular day, it was answered that the witness had surrendered within the limited time; and the record of the proceeding on the part of the Crown against the witness on that statute, and of the plea on * the part of the witness in his defence, that he * 723 did surrender within the time, which plea was admitted

(*x*) *R. v. Ld. Castlemain*, T. Ray. 370. So where a witness, after conviction for a crime, has stood in the pillory, the objection is removed by a general act of pardon. *R. v. Crosby*, 1 Ld. Ray. 39.

(*y*) 2 Haw. c. 46, s. 110. c. 37, s. 48, 49, 50.

(*z*) *R. v. Reilly*, Leach, 512.

(*a*) *R. v. Ld. Castlemain*, 3 St. Tr. 46, 47. *R. v. Ld. Warwick*, 5 St. Tr. 166. But see *R. v. Rookwood*, 4 St. Tr. 642. 3 Lev. 426.

(*b*) 3 Lev. 426.

(*c*) 2 Haw. c. 37. *R. v. Ld. Warwick*, 5 St. Tr. 166. Fost. 62. 1 Wils. 217. *Murphy's case*, Leach, 117.

(*d*) *R. v. Ld. Warwick*, 5 St. Tr. 166. *R. v. Miller*, 2 Bl. R. 797. *Gully's case*, Leach, 116. *Supra*, 720, note (*v*).

(*e*) Gilb. Ev. 259.

(1) [Where a prisoner had been pardoned, upon condition of leaving the State for a specified time, and the condition was not complied with, the court, after the expiration of the time, held the pardon to be void, and passed sentence. *The State v. Fuller*, 1 M'Cord, 178. But where, in such case, it appeared that the prisoner had been insane, after the conditional pardon was granted the court, upon his being seized and brought up for sentence, discharged him on condition of his departing within the same period originally limited in the pardon. *The People v. James*, 2 Caines's Rep. 57.]

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IV.

Effect of disability.

by the Attorney General to be true, was held to be conclusive evidence of the surrender within the time (*f*).

IV. The judgment for an infamous crime, even for perjury, does not preclude the party from making an affidavit with a view to his own defence (*g*). He may, for instance, make an affidavit in relation to the irregularity of a judgment in a cause to which he is a party (*h*), for otherwise he would be without remedy. But the rule is confined to defence, he cannot be heard upon oath as a complainant (*i*). Where a witness becomes incompetent from infamy of character, the effect is the same as if he were dead; and if he has attested any instrument as a witness, previous to his conviction, evidence may be given of his hand-writing (*k*).

INFANT.

Trial of non-age.

THE trial of the non-age of a party is either by inspection, or in the ordinary way by a Jury (*l*). In a suit to reverse a fine for the non-age of the cognizor, or to set aside a statute, or recognizance, and similar cases, a writ issues to the sheriff, commanding him that he constrain the party to appear, that it may be ascertained by the view of his body by the King's Justices, whether he be of full age or not, *ut per aspectum corporis sui constare poterit Justiciariis nostris si predictus sit plenæ ætatis necne* (*m*). Where the court entertains * doubts of the fact upon inspection, it may proceed to take proofs of the fact by the examination of the infant himself, and other witnesses, if necessary (*o*).

* 724

Although the promise of an infant will not bind him, except for necessities, yet he may take advantage of any promise made to him, although the consideration were merely the infant's promise, as in an action on mutual promises to marry (*p*).

(*f*) *Ld. Lovat's case*, 9 St. Tr. 652. 665.

(*g*) *Davis v. Carter*, 2 Salk. 461. 2 Str. 1148. [——— v. *Kimborough*, Martin's Rep. 25.]

(*h*) *Ibid*.

(*i*) 2 Salk. 461. 2 Str. 1148.

(*k*) *Jones v. Mason*, 2 Str. 833. Part II. sec. CXLIII.

(*l*) As to the proof of nonage, see tit. *Pedigree*.

(*m*) 9 Co. 31. According to Glanvil, l. 13, c. 15, nonage was formerly tried by a jury of eight men. 3 Bl. Comm. 332. [See *Skiver v. Shelback*, 1 Dallas, 166, that the fact of infancy must, in this country, be tried *per pais* and not by inspection.]

(*o*) 2 Roll. Ab. 373. 3 Bl. Comm. 332.

(*p*) *Holt v. Ward*, B. N. P. 155. 2 Str. 937. [*Cannon v. Alsbury*,

In an action on bond, or other specialty, infancy is not a defence under the plea of *non est factum*, for the deed of an infant is not void, but merely voidable (*q*), but in an action of simple contract, the infancy of the defendant at the time of the contract is *prima facie* a defence, unless the action be for necessities; he is not liable on an account stated (*r*).

Where evidence in bar.

But an infant is liable in respect of all torts committed by him, as for slander, or battery (*s*); (1) and in *detinue* for goods delivered to him for a particular purpose, and which he has failed to return (*t*). But if an action against an infant be founded in a contract, the plaintiff cannot, by changing the form of his action in respect of a breach, convert it into a tort, (2) as * by charging him in *tort* for the negligent or immoderate use of a horse which he has hired (*u*).

* 725

1 Marsh. (Ken.) Rep. 76.] So he may sue on a contract for a purchase of potatoes (*Warwick v. Bruce*, 2 M. & S. 205), or submit to a reference (*Knight v. Stone*, Sir W. Jones, 164, S. C. Noy, 93). So the infant may recover on a contract by the defendant for cutting and taking away the grass of the infant. Gilb. L. E. 187, 2d edit. 1 Vent. 51. 1 Mod. 25. 2 Sid. 41. 446. 2 Str. 937. 2 Keb. 561.

(*q*) B. N. P. 172. *Tam. qu.* if the deed be obviously to the prejudice of the infant. And see the observations of L. C. J. Eyre, in the case of *Keane v. Boycott*, 2 H. B. 515. [*Conroe v. Birdsall*, 1 Johns. Cas. 127. *White v. Flora*, 2 Overton's Rep. 431. *Roberts v. Wiggin*, 1 N. Hamp. Rep. 73.]

(*r*) Although it be on account of necessities supplied to him. *Ingledeu v. Douglas*, 2 Starkie's C. 36. Such an account is not evidence even to show the fact that the necessities were supplied, *ib.*

(*s*) 8 T. R. 336, 7. Bac. Ab. *Infancy*, H. [*Sikes v. Johnson & al.* 16 Mass. Rep. 389.]

(*t*) 1 N. R. 140.

(*u*) *Jennings v. Rundall*, 8 T. R. 335. The objection was there taken by plea of infancy, to which the plaintiff demurred. [*S. P. Schenck v. Strong*, 1 Southard's Rep. 87.]

(1) [An infant is liable to an action of deceit on the warranty of a horse. *Word v. Vance*, 1 Nott & M'Cord, 197. And to an action for malicious prosecution. *Semb. Sterling v. Adams & ux.* 3 Day, 411. So infants, who prosecute an unjust claim at law, and thus compel the defendant to resort to equity for an injunction and relief, and who there set up an inequitable defence, must pay costs. *Price v. Sykes*, 1 Ruffin's Rep. 87.]

(2) [In *Vasse v. Smith*, 6 Cranch, 226, it was held that an infant may be liable in trover, although the goods were delivered to him under a contract, and that infancy may be given in evidence under the general issue; as it may have some influence in determining whether the act complained of be really a conversion, or not.]

PART
IV.Proof in reply
to infancy.

If the defendant prove his infancy the plaintiff may reply by evidence that he ratified the promise upon attaining his age. His continuance in possession after his full age of lands demised to him during his minority, is an affirmance of the lease (*x*), and he will be liable to previous arrears of rent (*y*) (1). The plaintiff must prove a ratification of the agreement, a promise to pay the debt; a mere acknowledgment of the debt is insufficient (*z*), for the law will imply no promise in the case of an infant, but for necessaries (*a*), and therefore part payment, or an express promise to pay part, will bind him to that extent, but no further (*b*). (2)

(*x*) 1 Rol. 731, l. 35. Com. Dig. *Enfant*, C. 6. But if the estate to the infant was *void*, it cannot be affirmed, by his agreement at full age; as, if an infant lessee take a new lease, to commence on a future day, it will not be a surrender, although it commenced at full age, and he then entered and claimed by the new lease. 1 Rol. 728, l. 40.

(*y*) Ibid. and Cro. Jac. 320. 2 Bulst. 69. Godb. 365. So during his infancy, if he occupy by virtue of the lease. 2 Bulst. 69.

(*z*) *Lara v. Bird*, H. T. 31 Geo. III. Peake's L. E. 297.

(*a*) *Thrupp v. Fielder*, 1 Esp. C. 628. Peake's L. E. 297.

(*b*) **Green v. Parker*, Cor. Foster, J. Peake's L. E. 297. And per Holt, C. J. in *Hyling v. Hastings*, 1 Ld. Ray. 389. See *Borthwick v. Caruthers*, 1 T. R. 648. Part III. p. 378; and *Bates v. Wells*, Cor. Holroyd, J. Lancaster Sp. Ass. 1822. Ibid.

A promise to pay a simple contract debt after the defendant has attained his age, must, in order to support an action, be made before
action

(1) [If an infant grantee of land continue in possession after he is of full age, it is an affirmance of the contract. *Hubbard & al. v. Cummings*, 1 Greenleaf, 11. And if an infant mortgagor, after coming of age, convey the same land to another, subject to the mortgage, which he recognizes in the deed, he thereby confirms the mortgage *Boston Bank v. Chamberlain*, 15 Mass. Rep. 220. So where an award, made under a submission by an infant's guardian, directed that the infant should pay to his mother an annuity in lieu of dower, and that she should release to him her right of dower—his acceptance of the estate free of dower, and entering upon and enjoying it, after he came of age, according to the award, were held to be a sufficient ratification. *Barnaby v. Barnaby*, 1 Pick. 223. So, although a lease of an infant's lands by his guardian is voidable, yet it is confirmed by any act of the ward expressive of his assent after he arrives at full age. *Van Dorens v. Everett*, 2 Southard's Rep. 460.]

(2) [A bare acknowledgment of the debt or an admission of the consideration upon which the promise was made during infancy, is not sufficient to make the party liable as upon a promise made when of full age. *Martin v. Mayo & al.* 10 Mass. Rep. 137. *Whitney & al. v. Dutch & al.* 14 Mass. Rep. 457. But the terms of ratification
need.

If the plaintiff reply that the articles supplied were necessities, he must prove the defendant's rank and condition in life, and show that the things furnished were suitable to and consistent with that situation. Whether they were necessities or not is usually a question of fact for the

PART
IV.

Necessaries.

action brought; *Thornton v. Illingworth*, K. B. sittings in bank, after Easter T. 1824.—(1) *Secus* in case of the statute of limitations. *Yea v. Fouraker*, 2 Burr. 1099.

In an action against an infant, to recover money advanced for him in Scotland, to prevent his arrest, it was held that proof was necessary to show that by the law of Scotland such a defence was available. *Male v. Roberts*, 3 Esp. C. 163; and see *Mure v. Kay*, 4 Taunt. 54. It seems that money advanced to release an infant taken on mesne process for necessities may be recovered here. *Clarke v. Leslie*, 5 Esp. C. 28; so to release an infant when in execution, *Ibid.* and see *Finly v. Jowle*, 13 East, 6.

need not be such as import a direct promise to pay—all that is necessary is that there be an express agreement to ratify the contract, by words, oral or in writing, which import a recognition and confirmation of the promise, 14 Mass. Rep. *ubi sup.* Thus where one, who made a note during his minority, acknowledged, after he came of age, that the money was due, and promised that on his return home he would endeavor to procure it and send it to the creditor—it was held to be a sufficient ratification. *ibid.* So where the party said, after he came of age, “when I return from this voyage, I will pay you”—and “I have not the money now but when I return from the voyage I will settle with” the holder of the note. 10 Mass. Rep. *ubi sup.* See also *Jackson v. Mayo & al.* 11 Mass. Rep. 147. So in the case of the award, mentioned in the preceding note, the defendant, after he was of age, enclosed money in a letter to his mother, saying—“you will find enclosed the sum of ——— in part towards your right of dower: The remainder I shall forward in a few days, &c.” *Barnaby v. Barnaby*, 1 Pick. 223. See also *Thompson v. Linscott*, 2 Greenleaf, 186.

But where a defendant, in conversation concerning a note made by him during infancy, said he owed the plaintiff, but was unable to pay, and that he would endeavor to procure his brother to be bound with him—it was held not to be a renewal of the promise. *Ford v. Phillips*, 1 Pick. 203. And where an infant had given his promissory note for a valuable consideration, though not for necessities, and after coming of age made his will, in which he directed all his “just debts” to be paid—it was held that his executors were not liable. *Smith v. Mayo & al.* 9 Mass. Rep. 62. *Sed vide Wright v. Steele*, 2 N. Hamp. Rep. 51. A promise, made after arrival at full age, must, in order to ratify one made during minority, and to be binding, be made deliberately, and with a knowledge that the party is not liable by law. *Ibid.* *Hussey & al. v. Jewett*, 9 Mass. Rep. 100. *Ford v. Phillips, ubi sup.* And the same evidence ought to be required of the confirmation of a voidable contract, after full age, as of the execution of a new one. *Rogers & ux. v. Hurd*, 4 Day, 57.]

(1) [*Ford v. Phillips*, 1 Pick. 202, and *Tappan v. Abbot & al.*, there cited. *acc. Wright v. Steele*, 2 N. Hamp. Rep. 51. *contra.*]

PART Jury (c). (1) An infant is liable * for necessary victuals (d),
IV. apparel (e), physic, and surgical attendance (f), schooling,
 and instruction (g), for a fine assessed on him on his admis-
Necessaries. sion to a copyhold estate (h). So he is liable for necessa-
 ries supplied to his wife (i) or child (k). But he is not lia-
 ble as for necessities in respect of goods bought to sell
 again, although he keeps an open public shop, for he has
 not discretion to carry on business (l), or for money sup-
 plied to buy necessities with, unless it be actually so ex-
 pended (m).

(c) The question generally depends upon the collateral circum-
 stances of the case, such as the rank and situation of the party, and
 the suitableness of the articles. The finding of the Jury is of course
 subject to the control of the Court in point of law. See Cro.
 Eliz. 583. Com. Dig. *Infant*, B. 5.

Regimentals supplied to an infant member of a volunteer corps
 are necessities. *Coates v. Wilson*, 5 Esp. C. 152.

(d) Co. Litt. 172, a. W. Jon. 182. And if he be a housekeeper, for
 victuals supplied to his family. 1 Sid. 112.

(e) Co. Litt. 172, a. 1 Rol. 179, l. 5. Or for making clothes;
 and if he bring the cloth to the tailor, the latter need not show that
 it was suitable to his quality (*Latch*, 157). An infant captain in the
 army has been held to be liable for a livery provided by his orders
 for his servant, being necessary for the credit of his station (*Hands*
v. Slaney, 8 T. R. 578); but it was held that he was not liable for
 cockades supplied to the soldiers by his orders, for these were not
 necessities incident to his station.

(f) Palm. 528.

(g) Co. Litt. 172, a. 1 Sid. 112. March, 40.

(h) *Evelyn v. Chichester*, 3 Burr. 1717. B. N. P. 154. Per Yates, J.
 Note, he enjoyed the estate when he came of age; but debt, it
 seems, would not lie in such a case, because an infant cannot charge
 his land; but if an infant lease for years and hold, he may be charged
 in debt for the rent.

(i) *Turner v. Trisby*, 1 Str. 168. B. N. P. 155.

(k) B. N. P. 155. For *persona conjuncta equiparatur interesse*
proprio. Barnes, 184.

(l) Cro. Jac. 494. B. N. P. 154. Peake's L. E. 281; and *Green*
v. Parker, there cited. *Whittingham v. Hill*, Cro. Jac. 494. *Whynall*
v. Champion, 2 Str. 1083. [*Van Winkle v. Ketcham*, 3 Caines's
 Rep. 323.] *Aliter*, by Clarke, Baron, B. N. P. 154.

(m) *Semble*, B. N. P. 154. 12 Mod. 197.

(1) [Whether articles furnished for an infant are of the classes
 for which he is liable, is matter of law; whether they were actually
 necessary and of reasonable prices, is matter of fact for the jury.
Beeler v. Young, 1 Bibb, 519. *Stanton v. Willson & al.* 3 Day, 37.

A horse is not within the denomination of necessities for which
 an infant is liable. *Rainwater v. Durham*, 2 Nott & M'Cord, 524.]

The plaintiff cannot show, in reply to the defence of infancy, that the infant stated an account with him even for necessaries (*n*). Where it appears that the things themselves were necessary, abstractedly considered, * it is still a good defence to prove that the de-

* 727

fendant was supplied with necessaries by his parents or friends, although no proof be given that this was known to the plaintiff (*o*).
By the law of England an infant under the age of twenty-one is privileged as to some misdemeanors, particularly in cases of omission, as not repairing a bridge or highway (*p*), for not having the command of his fortune till twenty-one he wants the capacity to do that which the law requires. Yet, with regard to other offences, even those of a capital nature, an infant is equally liable to suffer with a person of full uge (*q*) (1). By the law, as it now stands, and has stood at least ever since the time of Edward III., the capacity of doing ill and contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen, and in these cases the maxim of the law is, that *malitia supplet ætatem*. Under seven years of age indeed an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony (*r*). Also under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet, if it appear to the Court and Jury that he was *doli capax*, and could discern between good and evil, he may be convicted * and suffer death (*s*). But in all cases the evi-

Criminal liability.

Capacity, or matter of proof.

* 728

(*n*) *Trueman v. Hirst*, 1 T. R. 40. *Bartlet v. Emery*, *ibid.* 42, (*n*.) Peake's L. E. 280. *Ingledeu v. Douglas*, 2 Starkie's C. 36. [*Beeler v. Young*, 1 Bibb, 519. See also *Supra*, 278, note (1).]

(*o*) 2 Bl. Rep. 1325. *Ford v. Fothergill*, Peake's C. 229. 1 Esp. C. 211. S. C. [*Wailing v. Toll*, 9 Johns. 141. *Angel v. McLellan*, 16 Mass. Rep. 31.]

(*p*) 1 Hale's P. C. 20, 21, 22.

(*q*) In Bl. Comm. Vol. 4, p. 22, it is stated, that for a breach of the peace, riot, battery, or the like, an infant of the age of *fourteen* is answerable; but as an infant *under the age of fourteen* is liable to suffer death, can there then be any doubt as to his liability to suffer imprisonment for a less offence?

(*r*) Dalt. J. c. 147.

(*s*) Thus, a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed

(1) [An infant may commit treason, and thus subject his estate to forfeiture. *Denn v. Banta*, 1 Coxe's Rep. 266.]

PART
IV.

Competency.

dence of malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction (t).

The competency of an infant has already been considered (u). It is observed by Sir W. Blackstone (x), that where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances. Such evidence is always desirable in criminal cases to confirm the testimony of an adult witness, as well as that of an infant. It is, in many instances, even more desirable in the former than in the latter case, where the inexperience and simplicity of the witness render subordination very difficult.

* 729

* INSOLVENT (y).

Evidence of
proceedings
under.

By the stat. 1 Geo. IV. c. 119, s. 45, it is enacted, that a true copy of the petition, schedule, or order, judgment, and other proceedings, (specified in the Act), signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy, without being written on stamped paper, shall at all times be admitted in all Courts whatever, as legal evidence of the same. In order to prove the discharge of an insolvent by a Court of Quarter Sessions, independently of such a provision, it is necessary to give in evidence the order of the Court for the

their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared, upon their trials, that one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil (1 Hale's P. C. 26, 27. 4 Bl. Comm. 24). And there was an instance in the last century but one, where a boy of eight years old was tried at Abingdon for firing two barns; and it appearing that he had malice, revenge and cunning, he was found guilty, condemned, and hanged accordingly (Emlyn, on Hale's P. C. 25. 4 Bl. Comm. 24). Thus also, in modern times, a boy of ten years old was convicted, on his own confession, of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the Judges that he was a proper subject of capital punishment. Fost. 72.

(t) 4 Bl. Comm. 23, 24, from which these observations are taken.

(u) *Supra*, 393.

(x) 4 Bl. Comm. 214.

(y) It was well observed by Ld. Holt, that let a statute be ever so charitable, if it give away the property of a subject, it ought to be construed strictly.

discharge (z); and it has been held to be insufficient to prove a parol admission of the fact by the opposite party (a). So it is insufficient to produce and prove an order of the Insolvent Debtors Court to the Marshal for the discharge of the insolvent, although it recites the judgment of the Court (b). But it has been held, that an instrument purporting to be a copy of the original discharge, from the book kept for that purpose by the Insolvent Court, signed in the name of the proper officer, by his acting clerk, and having the seal of office affixed to it is evidence of the discharge (c), although the statute *direct that a certificate shall be evidence (d). Such a discharge is evidence in an action of *assumpsit*, under the general issue, where the cause of action is discharged under the Act, although the statute direct that the discharge may be pleaded (e). And a creditor who has consented that his debt shall be omitted in the insolvent's schedule, cannot afterwards claim it on the ground of the omission (f). * 730

INSPECTION.

WHERE it is essential to the justice of the case, the Courts will usually, in a civil proceeding, assist a party in obtaining the production of those documents in which he is interested, and which are in the possession of the adversary.

(z) *Scott v. Clare*, 3 Camp. 236.

(a) *Ibid.* In B. N. P. 133, it is stated, that in an action by the assignees of an insolvent debtor, the certificate made at the sessions is *prima facie* evidence of a due discharge of all the proceedings under the act, and that if there be any fraud or irregularity, it is incumbent on the defendant to prove it. *Gillam v. Stirrup*, Ca. Temp. Hardw. 145. *Savage v. Field*, *ibid.* 186. *Winstanley v. Head*, 4 Taunt. 192.

(b) *Doe d. Robinson v. Barton*, 2 Starkie's C. 473. Note, it appeared that the Court kept a book of its adjudications, in which the word "discharged," or a judgment to that effect, was written under the insolvent's name.

(c) *Carpenter v. White*, 3 Moore, 231.

(d) *Ibid.* As the stat. 53 Geo. III. c. 102, s. 24, and the above stat. 1 Geo. IV. c. 119, s. 45.

(e) *Ibid.*

(f) *Ibid.* The schedule in that case was not produced; for, upon the evidence, it was immaterial whether the debt in question was or was not included in the schedule; but in general the schedule should be produced and proved. Such a discharge is no bar to an action for mesne profits, although they accrued previous to the discharge; for they do not constitute a debt until judgment has been obtained. *Lloyd v. Peell*, 3 B. & A. 408.

PART
IV.

Oyer, &c.

* 731
Inspection,
when granted.

Where a plaintiff declares on a specialty, the defendant is entitled as of course to oyer of the deed ; and although the instrument be not declared upon, but is wanted for the purposes of evidence only, the Courts will compel the production for the purpose of inspection, stamping, or taking a copy upon the application of the party who has an interest in the instrument (*g*), although the practice was formerly to the contrary (*h*). * According to the present practice, a Judge will, upon summons, order a copy of the instrument on which the action is founded, to be delivered to the defendant or his attorney, whenever the action is founded upon a written instrument, whether it be a policy of insurance (*i*), bill of exchange, or special agreement or undertaking (*k*), and whether it be or be not stated in the declaration to be in writing. The rule laid down by Lord Mansfield on such occasions was, that wherever the defendant would be entitled to a discovery in equity, he should have it in a court of law (*l*). It has been stated that in an action between a Smithfield factor and a grazier, the Court ruled the plaintiff to show cause why he should not produce upon the trial his books of account of beasts sold, and of monies received on the defendant's account, and that no cause being shown, the rule was made absolute (*m*). It seems, however, to be a general rule, that a Court will not compel a party to discover his evidence before trial, by the production of his books or other private documents (*n*).

Where the plaintiff is either an actual party to an instrument in fact, or a party in interest, the Court will, if it be necessary, compel the production of it, in order to be stamped (*o*), or that a copy may be taken, although the in-

(*g*) Tidd, 523.

(*h*) Ib. & Salk. 215, where the Court refused a copy of a note, in an action on a parol contract, of which the note was merely evidence.

(*i*) Tidd. 524, 3d ed. and see the stat. 19 G. 2. c. 37, s. 6.

(*k*) Ib. *Barry v. Alexander*, 25 G. 3. *Goater v. Nunnely*, 2 Str. 1130.

(*l*) *Barry v. Alexander*.

(*m*) Tidd, 524, cites *Barry v. Alexander*, Mich. 25 G. 3.

(*n*) *Infra*, 733, 4, 5.

(*o*) *Bateman v. Philips*, 4 Taunt. 157, formerly the Court confined the rule to cases where the applicant was an instrumentary party ; but this was considered to be too strict ; a person, though no party to the deed, might take an estate in remainder, and thus have so strong an interest in it as to be entitled to the production, 4 Taunt. 161.

terest of the party does not appear, * except by his own declaration, claiming an interest (*p*). In order, however, to obtain this rule the applicant must either be an *actual party* to the instrument, or a *party in interest* (*q*). Where one part only of an indenture was executed, the Court compelled the defendant who had possession of it, to produce it for the inspection of the other party (*r*); for one part only having been executed, there was an implied agreement by the party who had the possession of it to produce it; and in such a case the Court will direct an inspection, although the plaintiff requires it for the purpose of discovering some defect in the deed (*s*). So, where a person holds a document as a trustee, the Court will compel the production in favour of the parties interested. Thus a stakeholder was compelled to produce a copy of a racing contract, to take a copy (*t*). So in actions on policies of insurance, the Court, or a Judge at Chambers, at the instance of the underwriters, will order the assured to produce all papers relevant to the issue (*u*). Inspection, when allowed.

* So, where an action is brought by a sailor for his wages, the Court will compel the master to produce the ship's articles, and give a copy (*v*). * 733

When a party is ordered to produce the documents which bear upon the issue, he is not bound to produce such parts of documents as do not relate to the issue; but if the applicant insist that any thing material has been withheld, Of what documents.

(*p*) *Vide* preceding note (*o*).

(*q*) *Taylor v. Osborne*, cited 4 Taunt. 159. As between two persons admitting themselves to be tenants in common, a court of equity will order the production of title deeds, in the hands of either, for the inspection of the other; but where one had sold his share, and was in possession, as mortgagee of the vendee only, the Court held that they could not compel it, the rule being, that a mortgagee has no right to show his mortgagor's title. (*Lambert v. Rogers*, 4 Merivale, 489.) An heir cannot support a bill for title deeds, without showing that they are in some way necessary to enable him to recover at law; he must rely on his title as heir; and if he cannot set aside the will he has nothing to do with the deeds. *Jones v. Jones*, 3 Merivale, 172.

(*r*) *Blakey v. Porter*, 1 Taunt. 386.

(*s*) *King v. King*, 4 Taunt. 666.

(*t*) *Barnes*, 439.

(*u*) 1 Camp. 562; 1 Taunt. 47. 167.

(*v*) *Abbott on Shipping*, 389; *Tidd*, 525. The stat. 2 G. 2. c. 36, s. 8, requires a written contract in case of foreign voyages, and the stat. 31 G. 3. c. 39, with respect to certain vessels employed in the coasting trade, enacts, that no seaman shall fail in any suit for the recovery of wages, for want of the production of the contract.

PART
IV.

the other party must, in analogy to the practice in the Court of Chancery, deny by affidavit that what he withholds is relevant (*x*).

When refused.

Where the applicant is neither an actual party, nor a party in interest, the Court will not compel the production of an instrument to be stamped (*y*). Where an action was brought on a bond, and the defendant, on a suggestion of forgery, moved that it might be examined in the hands of the plaintiff, by an officer from the Stamp Office, the Court refused the application, since it might be the means of convicting the party of a capital felony (*z*). And where each party has his own part of the instrument, the Court will not compel the defendant to produce his part or copy. If the plaintiff lose the bond on which the action is brought, the Court will not compel the defendant to produce his copy (*a*).

* 734 In general, the Court will not compel a party to * discover the evidence before the trial, by the production of his books or other private instruments (*c*); nor will they, it is said, grant a rule for the inspection of books or documents of a private nature in the hands of third persons (*d*).

Inspection of
Court Rolls
and Corpora-
tion Books.

The inspection of documents for the purposes of evidence is confined to civil cases, where the party has an interest in the document (*e*). The same common principle applies to court-rolls and corporation-books. With respect to a tenant or member, the books are public books; they are common evidence, which must of necessity be kept in some one hand, and then each individual possessing a legal interest in them has a right to inspect, and to use them as evidence of his rights; but with respect to a

(*x*) *Clifford v. Taylor*, 1 Taunt. 167; 1 Camp. 562. The Court will not compel an inspection of an agreement to enable the defendant to plead in abatement. *Beal v. Mind*, 2 D. & R. 419.

Nor, *semble*, in any case where the parties have an adverse interest. *Threlford v. Webster*, 1 Bing. 161. There the action was brought on bills of exchange; and the application was made on an affidavit that the defendant had possessed himself of the bills by fraud, and the fraud was denied on affidavit.

(*y*) *Taylor v. Osborne*, cited 4 Taunt. 159. So the court refused inspection to a plaintiff in replevin, of a deed to which he was no party, assigning to the avowant the reversion of the demised premises. *Brown v. Rose*, 6 Taunt. 283.

(*z*) *Chetwind v. Marnell*, 1 B. & P. 271.

(*a*) *Street v. Brown*, 6 Taunt. 302. [1 Marsh. 610. S. C.]

(*c*) Tidd, 525; 6 Mod. 264; but see 4 Burr. 2489; *infra*, 735.

(*d*) Tidd, 524; Ld. Raym. 705. 927; 1 Barnard. 466; Barnes, 236; C. T. Hardw. 130; 2 Bl. R. 850.

(*e*) Per Buller, *J. R. v. Holland*, 4 T. R. 694.

mere stranger, unconnected in interest, such books are to be considered as the books of a private individual, and no inspection can be compelled. This was decided, after much consideration, in the case of *The Mayor of Southampton v. Greaves* (f), notwithstanding several modern cases in which the granting such applications in the case of corporations seemed to have been considered as a matter of course (g). In that case the corporation brought an action against the defendant for tolls, and the Court denied the application to inspect. A similar application had been refused in an action of trespass, where the defendant justified under the corporation * of Ipswich, for distraining * 735 for a toll for repairing the quay (h), and in many other instances.

In an action between the impropiator and the parishioners, as to the right to a house, the Court refused to the former the inspection of the parish-books, and copies of so much as regarded his title, saying, that the case differed from that of copyholders, because all the tenants of the manor have an interest in the court-rolls, but the impropiator had a distinct interest from the parishioners; it was not a parochial right, but a title which was in question, and therefore it was not reasonable that the parish-books should be produced, which would be to show the defendant's evidence (i). Inspection of public books.

On a question between two, as to the right to a manor, the Court refused to grant a rule for the production of the

(f) 8 T. R. 590. See the opinions of Ld. Hardwicke, and of C. J. De Grey, there cited.

(g) *Mayor of Lynn v. Denton*, 1 T. R. 689; 3 T. R. 303. *Mayor of London v. Mayor of Lynn*, 1 H. B. 211. By the stat. 32 Geo. 3. c. 58. s. 4, the mayor, bailiff, or other officer of any corporation, having the custody or power over the records of the same, shall, upon the demand of any person, being an officer or member of such corporation, on the payment of one shilling, permit such person on any day or days, except Christmas Day, Good Friday and Sunday, between the hours of nine in the morning and three in the afternoon, to inspect the books and papers wherein the admission and swearing in of the freemen, burgesses, or other members or officers of such corporation shall be entered; and to have copies, &c. on paying sixpence for every hundred words for writing the same, under a penalty of 100l. This statute does not extend to the inspection of orders for the admission and swearing in. *Davies v. Humphreys*, 3 M. & S. 223.

(h) Per Lawrence, J. 8 T. R. 595; *Hodges v. Atkis*, 3 Wils. 396.

(i) *Cox v. Copping*, 5 Mod. 396. S. C. 1 Ld. Raym. 337. See also *R. v. Worsenham*, 1 Ld. Raym. 705; *The Queen v. Mead*, 2 Ld. Raym. 927. And see the case of *May v. Gaynor*, 4 B. & A. 301.

PART
IV.Inspection of
public books.

rolls at the trial, since it was out of the common case between two tenants (*k*).

In the case of *The King v. Algood* (*l*), in which most of the previous cases on the subject were referred to (*m*), it was held that a freehold tenant of a manor has no right to the inspection of the rolls, unless there be some cause depending. And where the question is between the lord and a stranger, inspection will not be granted (*n*); but a copyholder who claims an interest may have an inspection of so much of the rolls of a * manor as concerns his own interest (*o*), although no cause be depending at the time. Upon a question between the parish of *St. Margaret* and *The Dean and Chapter of Westminster*, as to the right of nominating the parish-clerk, the Court refused an inspection of the parish-books to the dean and chapter (*p*).

Upon the same principle, one who has an interest in any public books, whether Bank, East India, parish, or custom-house books, has a right to inspect them when they are material, and to take copies of them (*q*). In *Gery v. Hopkins* (*r*), an order was made for the production of the books of the East India Company, in a cause between parties having stock there, since the books, the Court said, were the title of the buyers of stock; so the books of the commissioners of the lottery, and their numerical lists, are of a public nature, and ticket-holders may have an inspection of them by rule of court (*s*). But the East India Company, it was held, were not obliged to produce their private books or letters (*t*); nor any private books relating to

(*k*) *Wood v. Whitcomb*, 12 Vin. Ab. 146. pl. 9.

(*l*) 7 T. R. 746.

(*m*) *R. v. Shelley*, 3 T. R. 141; *Hodson v. Parker*, 27 G. 2. C. B. Barnes, 237. *Talbot v. Villeboys*, Mich. 23 G. 3. *Roe v. Aylmer*, Barnes, 321; *Baldwin v. Tudge*, ib. all cited 3 T. R. 142.

(*n*) *Talbot v. Villeboys*, cited 3 T. R. 142.

(*o*) *R. v. Lucas*, 10 East, 235; *Bateman v. Phillips*, 4 Taunt. 162. See also *R. v. Tower*, 4 M. & S. 162, where the Court granted a mandamus to the lord to permit a copyhold tenant to inspect the rolls of the manor, as far as they related to the cutting of underwood, where the tenant had been forbidden to cut underwood, although no cause was depending.

(*p*) *Turner v. Gethin*, 12 Vin. Ab. 147, pl. 11.

(*q*) 7 Mod. 129; 1 Str. 304; Barnes, 236; 1 Barnard. 455; 2 Str. 954. 1005.

(*r*) 7 Mod. 129. S. C. 2 Ld. Raym. 851; 1 Salk. 281. 285; 2 Salk. 555.

(*s*) *Scinotti v. Bumstead & others*, Hil. 36 G. 3; Tidd. Pr. 531, 3d. edit.

(*t*) *Shelling v. Farmer*, 1 Str. 645.

the appointment of their servants (u); nor will the Court allow an inspection in such cases, unless it be material (x); nor the inspection and copying of more than is material to the question (y); nor * will the Court compel the produc- * 737
tion of public books upon a question between parties who Public books.
have no interest in them. It was held that the officer served with a *subpœna duces tecum*, in order to decide a wager between two persons as to the amount of the revenue, was not bound to produce the books (z).

An inspection is never granted in a criminal case be- In criminal
cause no one is bound to produce evidence against him- cases.
self (a). Upon an information against one of nine trustees of a charity, incorporated by act of parliament, by the name of Surveyors of the Highways of Aylesbury, for executing his office without taking the oaths, the Court denied to the prosecutor (b) inspection, and copies of their

(u) *Murray v. Thornhill*, 2 Str. 717.

(x) *Benson v. Port*, cited 1 Wils. 240; 1 Bl. R. 40; 1 Barnard. 455; 2 Str. 1223.

(y) *Ib.* and *Slade v. Walter*, 12 Vin. Ab. Ev. 146, pl. 8. In an information in the nature of a *quo warranto*, obtained at the relation of corporators against a person charged with unlawfully holding a corporation office, the Court limited the rule, granting to the relators inspection of the books, &c. to such papers as related to the question. *R. v. Babb*, 3 T. R. 579. *Corporation of Barnstaple v. Lathey*, 3 T. R. 303; *Young v. Lynch*, 1 Bl. R. 97; and see Part II, 371. And under a Judge's order to inspect and grant copies, it is sufficient to give extracts of those parts of the letters which are relevant to the subject. *Clifford v. Taylor*, 1 Taunt. 167.

The Court will not compel a vestry-clerk to permit the inspection of parish-books, except for parochial purposes. *May v. Gwynne*, 4 B. & A. 301.

In *R. v. Smith*, 1 Stra. 126, a rule was made on a justice of peace, *quod produci faciat*, an examination on the trial. And it was said that where things are evidence of themselves, as corporation-books, no rule is made to produce them, but only that copies may be taken, which copies are evidence. But that an examination is not evidence of itself, without proving the hand of the party, and so of warrants and affidavits, and therefore a copy of such is not evidence. See *Welsh v. Richards*, Barnes, 126.

(z) *Atherfold v. Beard*, 2 T. R. 610.

(a) *R. v. Purnell*, 1 Bl. Rep. 37; 1 Wils. 239. Per Buller, J. 3 T. R. 142; 4 T. R. 694. 1 Barnard. 455; 2 Str. 1005. 1223; 3 T. R. 303; 2 Taunt. 115. The court refused a tenant of the manor an inspection of the court-rolls, where the lord was indicted for a nuisance in omitting to repair the banks of a river. *R. v. Lord Cadogan*, 5 B. & A. 902.

(b) *The Queen v. Mead*, 2 Ld. Raym. 927. 12 Vin. Ab. 146, pl. 6. *R. v. Dr. Bridgman*, 2 Str. 1203; 1 Ld. Raym. 705; 2 Str. 1005. 1210; 1 Wils. 239; 4 Burr. 2489; 1 Bl. R. 37. 351.

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books of elections, and of their receipts and disbursements, because they were of a private nature, and it would be to make a man produce evidence against himself in a criminal case. Nor is it granted in criminal cases, at the instance of the defendant, in any case, with respect to any depositions or examinations of any kind which have taken place. And therefore where an information had been filed against Holland, upon the report of a Board of Inquiry in India, the Court refused the defendant's motion for an inspection, and said that they had no power to grant it (c).

* 738 It seems that a proceeding by *quo warranto* is not considered as a criminal one within the rule (d). The motion for leave to inspect books is made upon affidavit, * stating the circumstances of the case, and that application has been made and refused (e). It seems that the Court will not grant the motion before issue joined, for till then it does not appear whether an inspection is necessary (f).

INTENTION.

Intention in
criminal cases.

It is a general rule in law (g), as well as in morals, that a criminal mind and intention is essential to the constitution of guilt; and that the mere external act is innocent or criminal according to the intention of the agent from which it resulted. Thus, an act in itself apparently innocent, as the mere act of embark-

(c) *R. v. Holland*, 4 T. R. 691.

(d) See *R. v. Babb*, 3 T. R. 579.

(e) Tidd. Pr. 533; 3d edit.; 3 Wils. 399; 2 Str. 1228.

(f) 3 Wils. 398; 1 Ld. Raym. 253; Carth. 421.

(g) There are, it is true, a few, and but a few, instances to the contrary to be found in the Statute Book, but it would be out of place to notice them here. Where a widow woman was indicted before Mr. J. Foster, for having in her custody pieces of canvas, contrary to the stat. 9 & 10 W. 3. c. 41, she not being a person employed by the Commissioners of the Navy, to work the same for his Majesty's use, the learned Judge, (notwithstanding the objection made by the counsel for the crown,) admitted proof in defence that the canvas had been brought into family use in the life-time of the defendant's husband, and that it continued to be used in the family till his death, and had come to her by act of law. He said, that if the defendant's husband really bought the linen at a public sale (as was probable), but neglected to take a certificate, or preserve it, it would be contrary to natural justice, after so great a length of time, to punish her for his neglect. He therefore left the case to the Jury upon the evidence, directing them to acquit her, if they found that she came into possession of the goods without any fraud or misbehaviour on her part; and she was acquitted. Fost. 439; 2 East's P. C. 765—See also *Bell's case*, Fost. 430, *supra*, 378.

ing for a foreign country, or landing in this, may, if proved to have been done for the purpose of levying * war against the king, or of destroying his person, amount to an overt act of treason (h).

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* 739

In our civil code also the same rule prevails to a great extent; it is in numerous instances, in order to establish a legal right, essential to prove not only a mere external act done, but also to show the mind and intention of the agent. In actions founded, for instance, on malicious injuries, it is necessary to prove that the act was accompanied by a wrongful and malicious intention. Of this principle the law relating to actions for slander affords a forcible illustration.

In civil cases.

Now, since *intention* consists in the internal and invisible resolve or determination of the mind, its existence must usually be matter of inference, and presumption from external and visible acts and conduct, which serve to indicate more or less forcibly the particular intention (i). The force of the inference results from the consideration that the intention of a rational agent corresponds with the means which he employs, and that he intends that consequence to which his conduct naturally and immediately tends. This inference is usually one of *fact*, to be made by a Jury, by virtue of their knowledge and experience, from all the circumstances of the case; but in this, as in some other instances, where the inference *necessarily* arises from the facts, it is a conclusion of law which the Courts can deduce from the facts without the intervention of a Jury. It is an universal principle that a man shall be taken to intend that which he does, or which is the immediate and necessary consequence of his act (k). Thus in cases of homicide the Courts frequently infer malice from the facts, without an express finding of malice by the Jury; in other words, malice arises by construction * of law from the facts as found by the Jury (l). So also a *fraudulent* intention is frequently an inference of law, from the particular circumstances of

How proved.

When an inference of law.

* 740

(h) *Crohagan's Case*, Hale 116; Cro. Car. 332; Fost. 202, 203.

(i) *Vide supra*, vol. i. p.

(k) See *Ld. Ellenborough's Observations*, 3 M. & S. 15. Per Lord Hale (P. C. 229), although the best trial of an intention be by the act intended, when it is done, yet the intent may be tried and found by circumstances, for although bare intention cannot receive any trial, yet intention, joined with an overt act, may be tried and discovered by circumstances. *Ibid.*

As to the divisibility of averments of intention, see Part iv. tit. *Variance*.

(l) See tit. *Murder*.

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intention.

the case (m); and so it is where the intention of the parties is to be collected from a written instrument (n).

It is a rule of law (where a *general* felonious intention is sufficient to constitute the offence) that a man who commits one felony in attempting to commit another, cannot excuse himself on the ground that he did not intend to commit the particular felony (o). Thus, if *A.* intending to shoot *B.*, miss him but destroy *C.*, against whom he had no malice, he will be guilty of the murder of *C.* (p).

But in such a case the offence contemplated must be a felony; if a man intending to commit a bare trespass were to shoot another, it would amount at most to the offence of manslaughter (q.)

Particular
intention.

It seems that the rule is to be confined to cases where a *general* allegation of a malicious and felonious intention is sufficient, and that it does not extend to offences where a particular and specific intention is essential (r).

* 741
Where a ques-
tion of fact.

Where, however, the facts of the case may consist with either a good or bad intention, the existence * of the one or the other is usually a question for the Jury, either as a pure question of fact, unmixed with any legal presumption, or as intermixed with legal considerations (s). In all cases of libel, let the inference of malice, from the terms of the publication, be ever so cogent, the existence of malice must be found as a fact by the Jury (t).

Where the inference of malice does not necessarily arise from the fact and circumstances, it is for the Jury to decide upon it as a question of fact, considering the whole of the evidence (u), both in civil and criminal cases, as, whether

(m) See tit. *Bankruptcy—Fraudulent Conveyance*.

(n) See tit. *Parol Evidence*.

(o) East's P. C. 514.

(p) See *supra*, tit. *Arson*.

(q) *R. v. Dobbs*, East's P. C. 513.

(r) Thus, if *A.* were to cut *B.* in attempting to murder *C.* it seems that *A.* would not be guilty within the stat. 43 G. 3, c. 113, for the indictment must allege a specific intention to murder or injure *C.* which would be negatived by the evidence. If in that case *A.* had actually killed *B.* he would have been guilty of murder; but in order to constitute murder, a general malicious and felonious intention is sufficient, and it is not necessary that it should be specifically pointed at the individual.

(s) See the observations of Buller, J. in *Estwick v. Caillaud*, 5 T. R. 426; and of Ld. Ellenborough, 3 M. & S. 15; and of Ld. Mansfield, *R. v. Woodfall*, 5 Burr. 2661.

(t) See tit. *Libel*; and Starkie on Libel.

(u) Bac. Ab. Trial, G. 1 Hale, 229.

the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independently of any intention to injure another, or even of carelessness or negligence, and according to that determination the offence may amount to murder, or merely to manslaughter, or chance-medley. And in order to arrive at a just conclusion upon such questions the Jury ought to act upon those presumptions which are recognized by the law, as far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence.

A doubt has prevailed, whether a criminal agent who effects the particular mischief prohibited, but who has a different and primary object in view, can be guilty of an intention to effect the particular mischief, which is but ancillary to the principal purpose. This difficulty seems to have arisen from considering that as a question of law which is in strictness a mere question of *fact*. If the prisoner did in fact intend the particular *mischief, it can be no better defence in point of law (*x*) than of morals that he also intended some other, and perhaps greater injury. Whether he intends the particular consequence, is a question of fact for the Jury. A man, it seems, *intends* that consequence which he contemplates, and which he expects to result from his act; in this respect the legal sense of the term intention does not differ from its usual and ordinary meaning. It is therefore a question for the Jury, whether the agent did not, in attempting to attain his primary object, also contemplate and expect the collateral mischief; if he did, then in every sense of the word, both legal and moral, he intended that consequence (*y*).

Primary and
collateral
intention.

* 742

(*x*) See Fost, 439.

(*y*) The intention in such cases seems, in the common use of the word, to depend, not upon the necessity of the connexion between the act and the consequence, but on the contemplation and expectation of the agent, that the consequence will result from the act. He may not *intend* the consequence, although it be the necessary and certain result of the act; as where one ignorantly administers to another deadly poison, supposing it to be a wholesome medicine, he does not intend the death, although it be the certain consequence of the act. So he may intend a consequence, although that consequence *cannot* result from the act; as where one supposing that which is in its nature perfectly harmless to be poison, administers it under the *expectation* that it will occasion death, there he *intends* death, although it cannot result from the act. It is obvious, that in these cases the *intention* is identified with the *expectation* of the particular result, which exists in the mind of the agent. Where the party in doing an act contemplates and *expects* any one consequence, or any number of consequences from his act, in common

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Primary and
collateral
intention.

* It is, therefore, as it seems, a question of fact for the Jury, whether the prisoner in doing a particular act had in his mind or contemplation the particular mischief, that is, whether he *expected* that the consequence would follow. In *Williams's* case, where the prisoner was indicted for cutting the clothes of the prosecutrix with intent to spoil them, it appeared that the principal object of the prisoner was to injure the person. But Mr. J. Buller left it, as a question for the Jury, whether the prisoner made the assault with intent to spoil the clothes; informing them that they might consider whether a person who intended the end, i. e. the injury to person, did not also intend the means by which it was to be attained (z).

In the case of *Coke* and *Woodburne* (a), who were indicted under the Coventry Act for wounding Mr. Crisp, with intent to maim him, it clearly appeared that the primary object was to murder him; but the Jury finding that they contemplated the maiming as ancillary to the murder, the prisoners were convicted and executed. In a recent case (b), it appeared that the prisoner, in order to facilitate the commission of a rape, cut the private parts of the prosecutrix with a penknife, it was left by the learned Judge to the Jury, whether the prisoner, although he probably meant to commit a rape, did not also intend to do the prosecutrix a

* 744 grievous bodily harm, and that the intention *might be

parlance as well as legal construction he intends them all. If a man intending to get rid of a particular piece of evidence against him, were to burn the document, would it not be a manifest absurdity in him to say, that he did not *intend* to burn the paper or parchment on which the evidence was written, and that he merely intended to rid himself of the writing which it contained. Equally absurd would it be in point of law, were the publisher of gross libels on the characters of individuals to insist that his object was not to defame others, which was a mere collateral incident, but to profit by the sale of his libels.

(z) Leach, 597. The Jury found the prisoner guilty, but the Judges are said to have held, that to bring the case within the stat. 6 G. 1, c. 23; (which was made to prevent a particular and mischievous practice by the weavers, of destroying foreign manufactures introduced into this country) it was necessary that the primary intention should be to destroy the clothes. There were however, other objections which were fatal to the prosecution.

If the legal effect of the acts of the parties depend upon intention, that intention is a question of fact for the Jury. *Powis v. Smith*, 5 B. & A. 850.

(a) 6 St. Tr. 212.

(b) *R. v. Cox*, Cor. Graham, B. Chelmsford Assizes, 1818, and afterwards by all the Judges, under the Stat. 43 Geo. 3, c. 58.

inferred from the act itself. The Judges were unanimously of opinion that the conviction was right.

PART
IV.

INTERESTED WITNESS.

THE general principle which operates to the exclusion of an interested witness has already been adverted to ; its application in practice will now be more fully considered. It is proposed to consider,

- I. *The nature and extent of the disqualifying Interest, the time and manner of acquiring it, and of Exceptions from necessity.*
- II. *Its Effect upon secondary Evidence ; and*
- III. *The Mode of enforcing or removing the Objection.*
- IV. *The practical operation of these rules.*

I. The interest to disqualify must be some legal, certain, and immediate interest, however minute, in the *result* of the cause, or in the *record*, as an instrument of evidence, acquired without fraud. Nature of the disqualifying interest.

In the first place it must be a *legal* interest in the event of the suit, or in the record, as contradistinguished from mere prejudice or bias, arising from the circumstance of relationship, friendship, or any other of the numerous motives by which a witness may be supposed to be influenced. Must be a legal interest.

Thus in a criminal case a witness is competent, although she believes that the conviction of the prisoner will be the means of saving her husband's life (*a*). So an accomplice is competent to give evidence against his confederates, notwithstanding his own expectation of pardon in case of their conviction. So, although * the witness has derived * 745 his maintenance from the party (*b*). And in general the witness is competent, although he wishes that the party may succeed in whose favour he bears testimony (*c*).

(*a*) *R. v. Rudd, Leach*, 154 ; but it has been held that a witness who conceives himself to be interested, although he be not so, is incompetent. *Fotheringham v. Greenwood*, 1 Stra. 129 ; 1 T. R. 296. *Chapman's case*, cited 1 Str. 129. *tam. qu. et vid. infra*, p. 746.

(*b*) *Langhorne's case*, 2 St. Tr. 334. 891 ; 2 Haw. c. 46, s. 25 ; but see *Hale*, 280.

(*c*) 3 T. R. 33 ; 1 H. B. 308 ; Rep. Temp. Hardy. 359 ; Say. 45 ; Dougl. 106. A tenant is competent, in an action by the reversioner for damage done to the inheritance. *Doddington v. Hudson*, 1 Bing. 257. The co-obligor of a bond to the ordinary is competent to prove a tender by the administratrix. *Carter v. Pearce*, 1 T. R.

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Must be direct
and certain,
and not contin-
gent or doubt-
ful.

The interest must be a present, certain, vested interest, and not uncertain or contingent (*d*). And therefore the heir apparent to an estate is competent to give evidence in support of the claim of the ancestor, although one who has a *vested* interest as a remainder-man is incompetent (*e*). So it was held that a steward was competent to prove that a fine was payable on the death of the lord, although the establishment of the affirmative might render a re-admission necessary, and entitle him to a fee (*f*) (1).

So in an action for acting as assistant, the clerk of the company of wiredrawers was held to be a competent witness, although he was entitled to a crown for swearing in an assistant, for, although the suit might cause the defendant to be sworn, that was not the direct object of the suit, nor a necessary consequence of a verdict for the plaintiffs (*g*). So it was held that one who had lands in the

163. The case differs from that of bail, who become immediately liable. In an action by the indorsee against the maker of a note, the indorser, an uncertificated bankrupt, is competent, notwithstanding the probability that he will obtain his certificate. *Sikes v. Marshal*, 2 Esp. C. 705. One who takes no beneficial interest under a will is a competent witness for the executor who defends, although he is next of kin, and has taken steps to set aside the will. *George v. Dobson*, Cor. Burrough, J. Salisbury Sp. Ass. 1820. Mann. Ind. Append. tit. Witness C (*e*).

(*d*) Doug. 134. 1 P. W. 287. [*Day v. Green*, Hardin, 117. *Miller v. Field*, 3 Marsh. 106. *Baker v. Pearce*, 4 Har. & M'Hen. 502. *Hayes v. Grier*, 4 Binney, 83. *Lewis v. Manly*, 2 Yeates, 200. *Fernster v. Carlin*, 3 Serg. & Rawle, 132. *Stewart v. Kip*, 5 Johns. 256. *Ely & al. v. Forward & al.* 7 Mass. Rep. 25. *Phillips & al. v. Bridge*, 11 ib. 242.]

(*e*) 1 Salk. 283, [and Mr. Evans's note.] 1 Ld. Raym. 724.

(*f*) *Champion v. Atkinson*, 3 Keb. 90.

(*g*) *Company of Gold and Silver Wire-drawers v. Hammond*, Ford's MSS.

(1) [On the trial of an information filed against certain goods, a witness stated on the *voir dire*, that he assisted in seizing the goods, and expected some compensation from the informer, if they should be condemned, but not otherwise; and his testimony was held to be inadmissible. *M'Veaugh v. Goods*, 1 Dallas, 62—approved, 2 ib. 50. But an attorney is held to be a competent witness for his client, although he expects a larger fee in case of his client's success. *Newman v. Bradley*, 1 Dallas, 241. *Miles v. O'Hara*, 1 Serg. & Rawle, 32. *Slocum v. Newby*, 1 Murphey, 423. See *Benedict v. Brownson*, Kirby, 70.

In trespass *quare clausum fregit*, a witness, who answered on the *voir dire*, that he expected to have a lease from the plaintiff of the land on which the trespass was committed, was held to be competent. *Baker v. Pearce*, 4 Har. & M'Hen. 502.]

parish, but who was not actually rated to the poor, was competent in a case of settlement (*g*).

FART
IV.

* Where the interest is of a doubtful nature the objection goes to the credit, and not to the competency, of the witness (*h*). A party has such a direct and immediate interest in the event of a cause as will disqualify him when the necessary legal consequence of a verdict will be to better his situation, by either securing an advantage, or repelling a loss; he must either be a gainer or loser by the event (*i*).

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A direct and immediate interest in the event of the cause.

To specify all the cases under which a witness is rendered incompetent by such an interest would be impracticable, since the combination of circumstances which may render a witness a gainer or loser by the events of causes, are capable of variation to an almost infinite extent; and those classes of cases which most frequently occur will be subsequently considered (*k*); at present it may be observed that the interest may consist either in the expectation of acquiring a benefit or of avoiding some loss or deprivation (*l*).

If a party be really interested in the event of a cause he is not competent, although he does not apprehend that his interest is a legal one (*m*); for it would be exceedingly dangerous to violate a general rule because the witness does not understand his legal responsibility. If a witness supposes that he is under an *honorary* though not a *legal* en-

Apprehension of interest

(*g*) *R. v. Prosser*, 4 T. R. 17. *R. v. South Lynn*, 5 T. R. 664. *R. v. Kirdford*, 2 East, 559. *Deacon v. Cook*, Taunt. Spring Ass. 1789. Cor. Buller, J. cited Nolan's P. L. Vol. I. p. 378. But see the forcible observations made upon these cases by Sir D. Evans in his edition of Pothier, Vol. II. p. 306. See *Rhodes v. Ainsworth*, 2 Starkie's C. 215. [1 B. & A. 87. S. C.] Whether the principle laid down in the case of the *King v. Kirdford*, and the previous decisions, was properly applied or not, is a question which the stat. 54 Geo. III. c. 170, s. 9, has rendered immaterial, the cases themselves are still of importance to show the reliance which the Court placed on the general principle.

(*h*) *R. v. Bray*, R. T. Hard. 360. 3 T. R. 32, *Bent v. Baker*.

(*i*) Co. Litt. 6. 1 Sid. 237. 1 Keb. 836. *Smith v. Prager*, 7 T. R. 60.

(*k*) *Infra*, 760. And see the several appropriate heads, *Bills of Exchange*,—*Bankruptcy*, &c.

(*l*) Gil. Ev. 232.

(*m*) *R. v. Walker*, 1 Ford. MSS. 145. *Semble*, a released witness is competent, although he will not swear that he does not expect to be paid. 2 Dods. Adm. R. 20. But a witness who believes from the statement of his partner that he is a creditor of a bankrupt, is not a competent witness for the assignees. *Atkyns v. Seward*, Cor. Holroyd, J. Winch. Sp. Ass. 1819.

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—————
* 747
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of Interest.

gagement, as to indemnify the bail, he is still competent, (1) for he is under no * binding engagement, and it would be highly inconvenient to make competency, in such cases, to depend on the witness's notions of propriety, and it would savour of inconsistency to found a suspicion of his veracity upon a just and honourable feeling (*m*). It has indeed been said that a witness who conceives himself to be under a *legal* engagement is incompetent, although he is not so (*n*). It would however be productive of great inconvenience to substitute a witness's mistaken opinion of his legal liability for the more plain and simple test of actual liability; it might be impossible to render him competent, even by means of a release, for he still might be sceptical as to the operation of a release, and the practice might open a door to fraud.. The party who calls the witness has an interest in his testimony, which ought not to be defeated by any thing short of a legal interest in the event; and if the objection were allowed to prevail in this instance, the principle would extend also to the reception of a witness who has a legal interest in the event, but who fancies that he has not (*o*) (2).

(*m*) Per Mansfield, C. J. *Pederson v. Stoffles*, 1 Camp. 145. *Contra*, per Parker, C. J. *Chapman's case*, cited 1 Stra. 129.

(*n*) *Fotheringham v. Greenwood*, 1 Str. 129. *R. v. Walker*, 1 Ford, 145. By Ld. Loughborough, C. J. and Gould, J. in *Trelawney v. Thomas*, 1 H. B. 307; *Rudd's case*, Leach, C. C. 154. In the case of the *Amitie Villeneuve*, 5 Robinson's Adm. R. 344, Sir W. Scott rejected the evidence of a witness who stated that he conceived that he would be entitled to share in case his vessel should be deemed joint-captor, although he had signed a release; and the learned Judge decided this on the distinction which he had always understood to prevail between a witness who says only that he expects to share from the bounty of the captors, and one who thinks himself actually entitled in law.

(*o*) *Vide supra*, 746.

(1) [*Long v. Baillie*, 4 Serg. & Rawle, 227. *Gilpin v. Vincent*, 9 Johns. 219. *acc.* But in Connecticut, where a witness, interested in the event of a suit, on the ground of his being liable over to the defendant, having been released by the defendant, stated on inquiry, that he expected to pay the judgment and all expenses, if a recovery should be had against the defendant—he was held to be incompetent to testify for him. *Skilling v. Bolt*, 1 Conn. Rep. 147.]

(2) [In Virginia, Kentucky, New York and Massachusetts, it seems that a witness, who believes himself interested in the event of the suit, is incompetent, although he is not legally interested. *Richardson's Ex'or. v. Hunt*, 2 Munf. 148. *Sentney v. Overton*, 4 Bibb 445—*Trustees of Lansinburgh v. Willard*, 8 Johns. 428—*Plumb v. Whiting*, 4 Mass. Rep. 518. *Aliter*, in Vermont and Penn-

A witness is also interested if the record would be the instrument of securing to him some advantage, or of repelling some charge against him, or claim upon him in a future proceeding (o).

Interest in the
record.
* 748

* The operation of this rule necessarily and obviously depends upon another very important question, namely, in what cases the record in a former proceeding is admissible in evidence (p). In general, in all cases depending on the existence of a particular custom, a record establishing that custom is evidence, although the parties are different. Hence, it follows that no one is competent to support a custom who would be benefited by the establishment of it, because the record would be evidence for him in case his own right should subsequently be disputed. Accordingly, upon a trial at bar of an issue, whether by the custom of certain manors in Cumberland the lord was entitled, under particular circumstances, to a fine from his tenant-right tenants, the Court would not permit lords of other tenant-right manors in Cumberland, Westmorland, or Northumberland, to give evidence of the right (q), nor the tenants of other tenant-right estates there to give evidence against it (r).

So where the issue is, whether a custom exists that all the inhabitants of A. or all the tenants of a particular manor, have common of pasture in a particular spot, no inhabitant in the one case, or tenant in the other, is competent (s.)

(o) See *Bent v. Baker*, 3 T. R. 27. *Smith v. Prager*, 7 T. R. 60. *Abrahams v. Bunn*, 4 Burr. 2251.

(p) *Vide supra*, Part II. sec. lvii. & seq. [and notes. See also *Henderson v. Sevey*, 2 Greenleaf, 139. *Harvey v. Richards*, 2 Gallison, 216.]

(q) *Duke of Somerset v. France*, 1 Str. 654.

(r) S. C. Fort. 41.

(s) *Hockley v. Lamb*, 1 Ld. Raym. 731. Per Buller, J. 1 T. R. 302. Per Ld. Kenyon, C. J. 3 T. R. 33. B. N. P. 283. *Anscomb v. Shore*, 1 Taunt. 261, and *supra*, 392.

sylvania. *The State v. Clark*, 2 Tyler, 273—*Long v. Baillie*, 4 Serg. & Rawle, 226. *Fernsler v. Carlin*, 3 ib. 130. See also *Henry v. Morgan*, 2 Binney, 497.

In Maryland, if a witness is sworn upon the *voire dire*, and thinks himself interested, though in fact he is not, he cannot be sworn in chief; but where evidence is offered to the court to prove him interested, if it appears to the court that he is not interested, though the witness thinks himself so, he may be sworn. *Peter v. Beall*, 4 Har. & M'Hen. 342. In that State, a witness sworn on the *voire dire* can only be asked whether he conceives himself to be interested in the cause, or that he shall gain or lose by the event of it. *Moore v. Sheredine*, 2 Har. & M'Hen. 453. See *Post*, 756, note (2).]

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IV.Interest in the
record.

- Where the question is as to a prescription for a right of common, as appurtenant to the house of *A.*—*B.*, who has a similar house, is a competent witness, since the record would be no evidence in support of his prescriptive claim; but if the right in the common were to be claimed as appurtenant by custom to all houses similar to that of *A.*, *B.*
- * 749 would not be a competent * witness, because the record would be evidence of his own right (*t*).

It has been held that where the question is, whether several requisites in the aggregate will not confer particular advantages, one who possesses part only of those requisites is still competent, since the decision would not entitle him to a participation in those advantages (*u*). And therefore upon a question, whether to qualify one as a common-council man, it was requisite that he should both be an inhabitant, and also possess a burgage tenure, it was held that one who was an inhabitant, but who had no burgage tenure, was competent to narrow the right, and to confine it to such as had both qualifications (*x*).

Where a witness would by the conviction or acquittal of another discharge himself, he is in general incompetent (*y*); and therefore one indicted as an accessory to a felony can not be a witness in favour of the principal, whose acquittal

(*t*) B. N. P. 283. *John v. Fothergill*, Peake's Ev. Append. 1 T. R. 302. *Harvey v. Collison*, 1 Sel. N. P. 449. So a witness is not competent to establish a modus in a parish, or to exempt certain articles from the payment of tithes, where he himself would be liable were the claim to prevail. (*Ld. Clanricard v. Lady Denton*, 1 Gwill. 360. *Ancombe v. Shore*, 1 Taunt. 261; and *supra*, 392.) So a witness is not competent to prove a custom in a parish to an away-going crop, where he, as tenant of lands within the parish, would be entitled to the same privilege. See also *Jebb v. Povey*, 2 Esp. C. 679. *Post*. 1676. *A.* is a competent witness for the defendant to prove that he received money from him to be paid over to the plaintiff, for he is liable to the one or to the other, and the consideration that the record would be evidence for the defendant, if a verdict were to pass for the plaintiff, makes no difference, for the defendant must still go on to prove the payment of the money to the witness, and therefore it does not affect his legal situation. *Birt v. Kershaw*, 2 East, 458; see Lord Ellenborough's observations in that case on the case of *Buckland v. Tankard*, 5 T. R. 578. *Post*. 1649.

See also *Nir v. Cutting*, 4 Taunt. 18; *Ward v. Wilkinson*, 4 B. & A. 410. *Post*. 1647.

(*u*) *Stevenson v. Nevins*, 1 Str. 583. The Court relied also on the ground of necessity, and said, that he was in effect a witness against himself, by showing that he had no right.

(*x*) *Ib.* For other illustrations of this rule, see *Keightley v. Birch*, & another, 3 Camp. 521. tit. Common—Corporation—Custom.

(*y*) B. N. P. 288, 9. Gil. Ev. 223.

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would secure his own safety. But it seems to be a general rule, that no verdict founded either wholly or partially on the testimony of any witness in a criminal proceeding can be made use of either for or against him in any other * proceeding; and consequently no objection on that ground can be made to his testimony. Accordingly, upon the trial of an inquisition against the warden of the Fleet, for the escape of *A.*, who was in custody along with *B.* on a joint judgment and execution, issue having been joined on the question, whether the defendant had voluntarily permitted the escape, it was held that *B.* was a competent witness for the Crown, for although it was urged that the fact, if true, would entitle *B.* to his discharge, it was answered, that the record in that proceeding would be no evidence for *B.* in any action brought by him for false imprisonment (*a*). So upon the trial of an information against the warden for five escapes, one of the prisoners, whose escape had been permitted, but who had returned, was held to be competent, although he had given a bond to the warden to be a true prisoner (*b*).

* 750
Interest in the record.

If the interest be of the nature above described its magnitude is not material, and the objection must prevail, however minute the interest may be (*c*). The reason is sufficiently obvious; a plain and simple rule is absolutely necessary, and if a small degree of interest did not disqualify the witness, it would be impossible to draw a practicable line of distinction.

Magnitude of the interest.

A witness cannot by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony in any proceeding, whether civil or criminal. For the party had a legal interest in the testimony, of which he ought not to be deprived by the mere * wanton act of the witness (1). Accordingly, one who has been witness to a wager, and who afterwards bets on

Time and manner of acquiring the interest.

* 751

(*a*) *R. v. Huggins*, Fitzg. 80. 1 Barnard. 350.

(*b*) *R. v. Ford*, 2 Salk. 690. But note, the reason given in Salkeld is, that it was a private matter, of which there could be no other evidence. In another report of this case, the witness is stated to have been a bailiff, who had given a bond to the warden for the safe custody of the prisoner. [See Holt, 134. 12 Mod. 338.]

(*c*) *Burton v. Hinde*, 5 T. R. 174. 2 Vern. 317. [*Scott v. M'Lellan & al.* 2 Greenleaf, 194. *Butler v. Warren*, 11 Johns. 57.]

(1) [*Simons v. Payne*, 2 Root, 406. *Jackson v. Rumsey*, 3 Johns. Cas. 234. *Long v. Baillie*, 4 Serg. & Rawle, 222. *Baylor v. Smithers*, 1 Littell's Rep. 107. *Tatum v. Lofton*, Cooke's Rep. 115. *acc. Secus*, if the interest be created by the act of the law, or of the party by whom the witness is called. Cooke's Rep. *ubi sup.*]

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quiring the
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nesses.

the same point, is a competent witness for the party for whom he is called (*d*). So where a witness of an assault lays a wager that he will convict the defendant, he is still a competent witness for the Crown. And this seems now to be fully established, although it was once held that the witness was disqualified by a voluntary creation of an interest in the event, provided the party interested in his silence did not concur with him (*e*).

Where the witness is reduced to a state of neutrality by an equipoise of interest, the objection to his testimony ceases (1). Where, however, the witness is subject to two conflicting interests, one of which preponderates over the other, the difference is to be considered as an absolute interest which is not countervailed (*f*). Accordingly, in an action for money had and received, a witness is competent to prove that it was paid to him as agent for the plaintiff, since he admits that he owes it to one of the parties, and it is indifferent to him which of them is his creditor (*g*).

So in an action against the owner of a ship for money lent, the captain is a competent witness to prove that it was advanced to him on account of the ship (*h*).

So a pauper in a settlement case is a competent witness, for he must be maintained at all events (*i*), and any local prejudice by which he may be influenced does not constitute a legal disqualifying interest.

* 752 * Where the opposite interests are unequal, the witness has an interest on one side, measured by the excess of the one interest over the other. And therefore where the interest is equiponderant in other respects, yet if the witness would be liable to costs in one event but not in the other, it seems that he is incompetent to give evidence

(*d*) *Barlow v. Vowell*, Skinn. 586. B. N. P. 290. *George v. Pearce*, cited by Grose, J. 3 T. R. 37. *Bent v. Baker*, 3 T. R. 27. Cowp. 736. *R. v. Fox*, 1 Str. 652. See also *Forrester v. Pigou*, 1 M. & S. 9.

(*e*) *Rescous v. Williams*, 3 Lev. 152. *Baron v. Bury*, 12 Vin. 24. 2 Vern. 699. Eq. Cas. Ab. 224.

(*f*) See Evans's Pothier.

(*g*) *Ilderton v. Atkinson*, 7 T. R. 480.

(*h*) *Evans v. Williams*, 7 T. R. 481, n.

(*i*) 2 T. R. 267.

(1) [*Wright v. Nichols*, 1 Bibb, 298. *Cushman v. Loker*, 2 Mass. Rep. 108. *Nessley v. Swearingen*, Addison's Rep. 144. acc. And a witness, who is liable to an action by the party calling him, in case that party should not recover, but who is protected by the statute of limitations, is competent. *Ludlow v. Union Insurance Company*, 2 Serg. & Rawle, 119.]

tending to discharge him from such further liability (1). Thus it has been seen, that the drawer of a bill of exchange which has been accepted for his accommodation is not a competent witness for the acceptor in an action against the latter by an indorsee, for if the plaintiff succeeded he would be liable to the defendant for the costs (l).

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The preponderance must, however, in order to disqualify the witness, be certain and definite, for although it has been held that a witness was incompetent, because it would in one event be more difficult for him to recover the same sum of money than in the other (m), yet the principle of this decision is very dubious, and probably would not now be supported (n).

* In some instances the law admits the testimony of one interested, from the extreme necessity of the case; such a necessity arises from the particular nature of the subject of inquiry, which renders it exceedingly improbable that any person who is not interested should possess any knowledge of the facts, whether that improbability arise from the confined nature of the transaction, which makes it likely that no one is privy to it except the interested witness, or from the generality of the interest, which is equally likely, to affect all other witnesses (o). But it is to be particularly

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necessitate.

(l) *Jones v. Brooke*, 4 Taunt. 464, *supra*, 299. See also the case of *Maundrell v. Kennett*, 1 Camp. 408, *n. supra*, 301. In the case of *Ilderton v. Atkinson*, 7 T. R. 480, it was held, that a witness to whom the defendant had paid 200*l.* on account of the plaintiff, was a competent witness for the defendant to prove that he was the agent of the plaintiff when he received the money, although it was objected, that if the plaintiff succeeded he would be liable to the defendant for the costs of the action. But in this case the Court seems to have relied principally on the ground that the witness was competent as an agent to prove a fact done in the course of his agency, for they observed, that if such an objection were to prevail, it would exclude brokers who had effected policies of insurance. The decision in the case of *Birt v. Kershaw*, 2 East, 458, *supra*, 300, seems to rest upon the same principle, *vid. supra*, 300; and see *Ld. Ellenborough's* observations in *Hudson v. Robinson*, 4 M. & S. 480, & *supra*, 5, note (q).

(m) *Buckland v. Tankard*, 5 T. R. 578.

(n) See the observations made in *Birt v. Kershaw*, 2 East, 458. The mere preponderance of difficulties is of too uncertain and contingent a nature to afford a practical rule in such cases. [See *Page v. Weeks*, cited *supra* 301, note (2).]

(o) 3 Mod. 114. 6 Mod. 211. 1 Salk. 286. Holt, 300. 2 *Ld. Raym.* 1179. 1 *Sid.* 211. 237. 431. 2 *Keb.* 572. 384. 1 *Vent.* 49. *R. v. Moise*, 1 *Str.* 595.

(1) [*Beach v. Swift*, 2 Conn. Rep. 269. *Barnwell v. Mitchell*, 3 *ib.* 101.]

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observed, that this necessity must result not from the accidental failure of evidence in a particular and isolated case, for it would be highly impolitic to sacrifice a general rule in order to alleviate a particular hardship, but it must be general in its nature, embracing a large and definite class of cases, and it must arise in the usual and natural course of human affairs *p*). And it is to be remarked, that the law has justly been jealous of any extension of this rule, and that its operation has consequently been very limited in practice *q*).

Upon this ground it is the constant course to admit the servant of a tradesman to prove the delivery of goods, and the payment of money, without any release from the master *r*), because it is in the usual course of affairs that a servant should transact such business for his master; and it often happens that no other person can prove such transactions, and therefore to *exclude his testimony would frequently be to deprive the master of all evidence whatsoever *s*).

So it has been held that an apprentice is a competent witness to prove that money has been overpaid by his master *t*). So it was held that a broker, although he was also a joint insurer, was a competent witness for the plaintiff, in an action on a policy of insurance, as to a representation made by him to the defendant when he subscribed the policy, because it was not likely that any other person could prove it *u*). So in an action against a carrier for not delivering a parcel, his servant was held to be competent to prove the delivery *x*).

So in an action by the party robbed, against the hundred, he is a competent witness as to the fact of robbery, although he is not only interested, but the plaintiff in the

(p) See Mr. Evans's observations—Evans's Pothier, 208.

(q) See *Green v. The New River Company*, 4 T. R. 590; and Ld. Kenyon's observations in *Evans v. Williams*, 7 T. R. 481, in the note, where he says, that originally the plea of necessity was admitted in cases on the statute of Hue and Cry only.

(r) 4 T. R. 590. [*Alexander v. Emerson*, 2 Littell's Rep. 27.] The principle has been applied to the case of a common carrier. *Barker v. Macrae*, 3 Camp. 144.

(s) Except indeed through the medium of a release.

(t) *Martin v. Horrell*, 1 Str. 647.

(u) Per Buller, J. *Bent v. Baker*, 3 T. R. 27. *Vid. infra*, 782.

(x) *Ross v. Rowe*, 3 Ford's MSS. 98. *Vide supra*, tit. *Agent*. The rule does not extend to cases where actions are brought against principals for the negligence of their agents, *vid. infra*, 769.

suit (*y*). So interest is no objection to competency, if all persons who are likely to know the fact are equally interested (*z*). And therefore the loser of more than 10*l.* at a sitting is a competent witness upon an information under the statute 5 Ann. c. 14, s. 5, which subjects the winner to the forfeiture of five times the money won, upon conviction, and authorizes *any person* to sue for it, and therefore any person is as much entitled to sue for it as the witness (*a*). So in the case of extortion by duress, and in other similar cases, which from their very nature admit of no proof * but by the testimony of the party injured, he is, according to Lord Holt, a competent witness from necessity (*b*); but in such case the application of this rule is unnecessary, since the party defrauded is not disqualified as a witness (*c*).

Effect of the
objection with
respect to se-
condary evi-
dence.

* 755

II. Where the witness from interest becomes incapable of giving his testimony, the effect with respect to evidence seems to be the same as if he were naturally dead, since his lips are effectually closed. Accordingly, where a witness to a bond is interested at the time of the execution of the deed, and continues to be so at the time of the trial, the instrument cannot be proved by evidence of his handwriting since his attestation, when he was interested, was a mere nullity and of no more effect than if he had not existed (*f*).

In such case, as in the event of the natural death of the witness, the deed may be established by proof of the handwriting of the obligor (*g*). So in chancery, where a witness becomes interested, his deposition made whilst he was disinterested may still be read (*h*).

But it has been said, that where a witness becomes interested, his deposition cannot afterwards be read upon a trial at common law (*i*) (1).

(*y*) *Supra*, tit. *Hundred*. (*z*) *Rock v. Layton*, Fort. 246.

(*a*) *R. v. Luckup*, 1 Ford's MSS. 542.

(*b*) 7 Mod. 119.

(*c*) *Vid. infra*, 770.

(*f*) *Swire v. Bell*, 5 T. R. 371. Qu. how the case would be if the attesting witness being interested at the time of attestation afterwards became competent.

(*g*) *Godfrey v. Norris*, 1 Str. 34. *Goss v. Tracy*, 1 P. W. 287. So where he becomes infamous, *Jones v. Mason*, 2 Str. 833. *Supra*, Vol. I. p. 337.

(*h*) 2 Vern. 699. 1 P. W. 287. Eq. Cas. Ab. 224. 2 Atk. 665. 2 Ves. 42. 2 Ld. Raym. 1008. 1 Salk. 286.

(*i*) 2 Vern. 699. Eq. Cas. Ab. 224. *tam qu. & vid.* Vol. I. p. 263.

(1) [The deposition of a witness, who afterwards becomes interested.]
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Objection,
when to be
taken.

* III. According to the general rule (*k*), the objection to competency on the score of interest ought to be taken by examination on the *voire dire* before examination in chief (*l*). And for this purpose the witness may be examined generally as to his situation, and even as to the contents of written documents which are not produced (*m*); for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection; and in like manner his competency may be restored by his parol evidence on the *voire dire* (*n*) (*1*). The general rule is, that an objection to the competency of a witness ought to be made in the first instance, for reasons already adverted to (*o*). If the witness discharge himself on the *voire dire*, the party who objects may still afterwards support his objection by evidence, as part of his own case (*p*) (*2*); but in so doing the objecting party is

(*k*) Vol. I. p. 121.

(*l*) Formerly it was necessary to have the witness sworn on the *voire dire*, and to take the objection before he was sworn in chief, but the rule has been relaxed for the sake of convenience, see 1 T. R. 717. The witness may be examined on the *voire dire* in criminal as well as civil cases, *R. v. Muscot*, 10 Mod. 192.

(*m*) *Supra*, Vol. I. p. 122. *Howell v. Lock*, 2 Camp. 14. [*Mayo v. Gray*, 2 Penn. Rep. 837. *Fanning & al. v. Myers & al.* Anthon's N. P. 47.] But where the witness, on examination on the *voire dire*, produced the contract which rendered him incompetent, it was held that the contract ought to be read. *Butler v. Carver*, 2 Starkie's C. 433, Cor. Abbott, C. J.

(*n*) *Botham v. Swinger*, Peake's C. 218. S. C. 1 Esp. C. 164. *Butchers Company v. Jones*, 1 Esp. C. 160. But if competency be restored by a release, it seems that it must be produced and proved. *Corking v. Jarrard*, 1 Camp. 37.

(*o*) Vol. I. p. 121. *R. v. Muscot*, 10 Mod. 192. The interest of the witness to warrant the objection must appear either from examination on the *voire dire*, or from evidence; a mere suggestion of interest is not sufficient. In an action for goods sold and delivered it is not sufficient to suggest that a witness, called by the defendant to prove that the goods were supplied, not to the defendant but to the witness, is a partner with the defendant. *Birt v. Hood*, 1 Esp. C. 20.

(*p*) In the case of *The Queen v. Muscot*, 10 Mod. 192, Parker, C.

rested, and is alive at the time of the trial, is not admissible. *Irwin v. Reed & al.* 4 Yeates, 512.]

(1) [In *Den v. Jones*, 1 Coxe's Rep. 46, where a witness acknowledged on the *voire dire* that he was once interested, his own statement that the interest was at an end was ruled not to render him competent.]

(2) [There are two ways of proving a witness to be interested in

* bound by the usual rules of evidence, and cannot inquire as to the contents of a written instrument without producing

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J. is reported to have stated, that a party has his election to prove the interest of the witness, either by examination on the *voire dire*, or by evidence, but that he could not do both. But it would be an objection, when to be taken.

a cause ; first, by examining him on his *voire dire*, or, secondly, by showing his interest by other evidence : But both these ways cannot be pursued at the same time. Per M'Kean, C. J. *Mifflin v. Bingham*, 1 Dallas, 275. *S. P. Evans v. Eaton*, 1 Peters' Rep. 338. *Welden v. Buck*, Anthon's N. P. 10. n. *Bridge v. Wellington*, 1 Mass. Rep. 219. Swift's Ev. 109. *Berry v. Wallin & al.* 1 Overton's Rep. 107. *Ray v. Mariner & ux.* 2 Hayw. 385.

If a witness on the *voire dire* denies generally that he has any interest in the event of the suit, he may be particularly interrogated as to his situation, for the purpose of discovering his interest. *Emerton v. Andrews*, 4 Mass. Rep. 653. *Baldwin v. West*, Hardin's Rep. 50. *Reid's Lessee v. Dodson*, 1 Overton's Rep. 396—*Aliter*, in Maryland. See Ante, 747, note (1). And if he states generally that he is interested, he must be rejected, unless the examination is followed up so as to show that the interest is ideal only. *Williams v. Matthews*, 3 Cowen, 252.

When a witness has been examined by the party against whom he is called, as to his interest in the event of the suit, other witnesses cannot be inquired of as to his interest ; and it is immaterial whether such examination were under the general oath, or the *voire dire* ; or whether it were in court, or before a magistrate taking a deposition out of court. *Butler v. Butler*, 3 Day, 214. Where a party, on the trial, elects to prove the interest of a witness on the *voire dire*, and the witness purges himself and is sworn in chief, the party shall not, on motion for a new trial, be permitted to show, by other evidence, that the witness was interested. *Dorr v. Osgood*, 2 Tyler, 28. If one party proves, by evidence *aliunde*, that a witness is interested, the other cannot offer the witness's own oath to show that he has no interest. *Vincent v. Lessee of Huff*, 4 Serg. & Rawle, 298. But when testimony, which has been offered to prove a witness to be interested, has been overruled, he may still be examined on the *voire dire*. *Main v. Newsom*, Anthon's N. P. 11. And where a witness says on the *voire dire* that he does not know whether he is interested or not, his interest may be shown by other evidence. *Shannon & al. v. Commonwealth*, 8 Serg. & Rawle, 444.

After a witness has purged himself on the *voire dire*, and been sworn in chief, if it appear by the testimony of others that he is interested, the court cannot direct the jury to disregard his testimony. *Cole v. Cole*, 1 Har. & J. 572. But if it should appear, in any subsequent stage of his own examination, that he is interested, the court will set him aside. 1 Peters' Rep. *ubi sup.* *Baldwin v. West*, Hardin's Rep. 50.

A cross-examination of a witness under a rule of court is not on the same footing with an examination upon the *voire dire*, and does not preclude the party from taking any legal exception, at the trial, to the competency of the witness. 1 Dallas, *ubi sup.*

If a witness refuse to answer questions put to him on the *voire dire* concerning his interest in the cause, the court cannot presume

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interest cannot be released, the witness will not be competent *quasi ex necessitate*; and therefore no release will enable a bankrupt to prove his bankruptcy (y).

Where an interested witness has made a deposition, and being afterwards released, is again examined, his evidence

(y) *Field v. Curtis*, 2 Str. 829. [See *Brown v. Ins. Co. Pennsylvania*, 4 Yeates. 119. *McClenachan v. Scott*, cited 2 Dallas, 172, n. *Marks v. Barker*, Circuit Court, Oct. 1804. Wharton's Digest, 274.] A release in the common form is sufficient to discharge the drawer of a bill, accepted for his accommodation, from all claim by the acceptor on the bill, on the ground of any subsequent release against the acceptor, for the bill was an inchoate cause of action then existing. *Cartwright v. Williams*, 2 Starkie's C. 240. S. P. *Scott v. Lifford*, 1 Camp. 249. *Vide etiam*, Part. iv. tit. *Surety*, 1385. A release by one of two plaintiffs who are partners is sufficient. *Hockless v. Mitchell*, 4 Esp. C. 86. In an action against the owner of a vessel for the negligence of the pilot, the latter is a competent witness, if he be released by the defendant, though he be not released by the captain. *Aldrich v. Simmons*, 1 Starkie's C. 214. [S. C. 4 Camp. 392.] A guardian *ad litem* cannot release. *Fraser v. Marsh*, 2 Starkie's C. 41.

A rated inhabitant being indemnified by his landlord's covenant to reimburse in respect of rates, held to be competent. *R. v. Woodland*, 1 T. R. 261. 3 East, 8.

Where one is interested as a surety, the court will in some instances interpose to release him, on the substitution of another. *Bailey v. Bailey*, 1 Bing. 92.

tains an interest in supporting his possession under his landlord. *Vincent v. Lessee of Huff*, 4 Serg. & Rawle, 298.

If the witness have a present beneficial interest in the subject matter of a suit, although the reducing of it into possession be future and contingent; such interest may be extinguished by a release. *Woods v. Williams*, 9 Johns. 123. So in an action by the administrator of the witness's wife, a release by the witness to the plaintiff of "all right to any sum or sums of money which may be recovered in the case," renders him competent. *ibid.* And in an action by an administrator, an heir of the intestate is a competent witness, on giving to the plaintiff a release of his proportion of the money which may be recovered in the suit. *Boynton v. Turner*, 13 Mass. Rep. 391. Heirs of a warrantor, who have a release from the grantee, are competent witnesses for him to prove the boundaries of the land. *Bowman & al. v. Whittemore*, 1 Mass. Rep. 242.

A prosecutor under the election law of Pennsylvania, who is entitled to one moiety of the fine, may be admitted as a witness on executing a release to the defendant. *Respublica v. Ray*, 3 Yeates, 65. S. P. *Torre v. Sumners*, 2 Nott & M'Cord, 267.

Where a witness objected to as interested receives a release, he is not to be confined to the particular point in which it was stated that his testimony was material—but he may be examined generally on any point. *Carrol v. M'Whorter*, 2 Bay, 463.]

is admissible, although the second deposition be the same with the first (z) (2).

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A party cannot, by refusing his assent to a release * or surrender, tendered by a witness on the other side, exclude his testimony (a).

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removed—
Release, &c.
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The witness and the defendant having, with other underwriters, filed a bill in equity against the plaintiff for relief, the plaintiff on this ground objected to witness, as being interested; the witness and defendant offered to pay the costs of the bill, and to procure it to be dismissed, and the witness was held to be competent, although the plaintiff still objected that there were other plaintiffs in equity (b).

So where the lessor, in an ejectment, refused to accept a surrender of an estate devised to the witness, who was called by the defendant, who claimed as devisee, to prove the testator's sanity (c). So it seems that a witness cannot, by perversely refusing to accept a release, deprive a litigant party of the benefit of his testimony (d).

A legatee whose legacy has been paid, or any other person whose interest is founded upon a claim which has been satisfied, is a competent witness (e).

(z) *Callow v. Mime*, 2 Vern. 472. The bias on his mind to adhere to his former testimony goes to his credit. A release given to one who has made a deposition whilst he was interested does not render his deposition admissible. *Sikes v. Marshal*, 2 Esp. C. 708. See also tit. *Will*.

(a) Per Ld. Kenyon, C. J. and Buller, J. 3 T. R. 27.

(b) *Bent v. Baker*, 3 T. R. 27.

(c) *Goodtitle v. Welford*, Doug. 139.

(d) Doug. 139. *qu*.

(e) See *Kingston v. Grey*, 1 Ld. Raym. 745, where, upon issue taken on the plea of *plene administravit*, it was held that a bond-creditor who had been paid was competent to prove the debt and payment, although if the bond was not authentic, or the debt not due, he would be liable to refund. But (*semble*) the liability to refund was no objection to his testimony, since in an action to recover the money, the verdict in that cause would not have been evidence, and his legal situation would not have been altered.

(2) [A release to a witness after his deposition has been taken or his testimony given, is too late, and his deposition cannot be admitted, nor his testimony validated. *Heyl v. Burling*, 1 Caines' Rep. 14. *Doty v. Wilson*, 14 Johns. 378. But where there is a mere informality about a release, and the judge allows the examination of the witness to proceed *de bene esse*, without objection from the opposite party, the execution of a competent release afterwards may render the testimony good. 14 Johns. *ubi sup*.

Where after a witness has given his testimony, it is discovered that he is interested, he may still release his interest, and be re-examined. *City Council v. Haywood*, 2 Nott & M'Cord, 308.]

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removed.

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So although in prosecutions for forgery it is a general rule that the party whose name is forged, and who would be liable upon the instrument, supposing it to be genuine, is not a competent witness (1); yet where a bill of exchange was forged, purporting to be drawn * by *A.* on *B.* payable at *C.*'s banking-house, which *C.* had paid, supposing the acceptance to be genuine, but afterwards had given credit to *B.* for the amount, it was held that *B.* was a competent witness (*f*).

So where the party whose receipt had been forged had previously recovered the money from the prisoner (*g*).

So where the party whose name had been forged to a receipt, for the amount of articles supplied by him, had been paid the amount of his bill (*h*).

So in the case of the forgery of a bill of exchange, purporting to have been drawn by the witness, if he be released by the holder and there be no other party whose name is on the note to whom the drawer is liable, he will become competent (*i*).

So if the supposed obligor of a bond be released by the supposed obligee, the former will be competent (*k*).

In order to render a witness competent by a release, it is necessary to produce the release, and prove its execution (*l*). And such an instrument when produced and proved, is, it seems, evidence as a document in the cause for all purposes (*m*).

Accomplices.

IV. The general competency of an accomplice has been already considered (*n*). Some further observations will be made as to the situation of accomplices and joint wrong-doers in general, as to their competency in respect of interest. In criminal proceedings * the motive which usually operates upon the mind of an accomplice as a witness for the Crown, is the expectation of personal security (*o*). This, it has been seen (*p*), does not disqualify the

(*f*) *R. v. Usher*, Leach, C. C. L. 57, 3d edit. East's P. C. 999. *R. v. Testick*, East's P. C. 1000. 12 Mod. 338.

(*g*) *R. v. Wells*, B. N. P. 289. *R. v. Dean*, 12 Vin. Ab. 23.

(*h*) *R. v. Smith*, East's P. C. 1000.

(*i*) *R. v. Akehurst*, Leach, 178.

(*k*) *R. v. Dodd*, Leach, C. C. L. 87. East's P. C. 1003.

(*l*) *Corking v. Jarrard*, 1 Camp. 17.

(*m*) *Gibbons v. Wilcox*, 2 Starkie's C. 43, per Holroyd, J.

(*n*) *Supra*, 17.

(*o*) As to the expectation of a reward.—*Vid. infra*, 772.

(*p*) *Supra*, 20.

(1) [See American decisions on this point, *Ante*, p. 583, note (1).]

witness; it was formerly held, that even an express promise of pardon would not render him incompetent (q). According to the present practice, an accomplice has nothing more than an equitable title to pardon in case he gives his testimony fairly and openly. And although in certain cases an accomplice who discovers other offenders is by the statute law entitled to a pardon (r), he is still considered to be a competent witness upon a consideration of the intention and construction of those statutes.

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Expectation of
pardon.

The same principle applies to the case of bribery under the stat. 2 Geo. II, c. 24; for although the statute enacts, that the discoverer of any other offender shall be indemnified from all the penalties of the act, it was held that a witness, in an action under the statute, was competent, although he claimed to be the first discoverer of the defendant's bribery, and although he meant to avail himself of such discovery in an action already brought against himself (s); for upon a consideration of the statute the court held that the Legislature intended to render the discoverer a competent witness, although he would have been incompetent at common law, his own indemnity being the natural and immediate effect of a conviction.

Where an accomplice is to be used as a witness, the usual course, it has been seen, is to leave him out of * the indictment (t), or for the Attorney General to enter a *nolle prosequi* (u). But yet, although he be jointly indicted for an offence which is several in its nature, it may be doubted whether he be not still competent, provided he be not put upon his trial at the same time; for though several be indicted jointly for the same offence, yet the indictment, where the nature of the offence is several, is also several as to each, and the case seems to be just the same as if each

Competency of
a co-defendant.
* 762

(q) *Supra*, 19.

(r) *Supra*, 20.

(s) *Heward v. Shipley*, 4 East, 180. And *supra*, 20, note (e).

(t) *Supra*, 21. Where an accomplice has been inadvertently included in the indictment, if it should be deemed necessary, an acquittal might be taken as to him.

(u) *Ward v. Man*, 2 Atk. 229, by Ld. Hardwicke, who said, that in crown prosecutions no defendant can be examined in behalf even of the King; but the attorney-general enters a *nolle prosequi* against that particular defendant before he can be admitted as a witness, and that this was done in a case by Trevor, when attorney-general. See also the case of *The King v. Ellis, Blake & others*, Sitt. after Hil. 1802, Macnally, 55; whereon an information by the attorney-general (Law) against several for a conspiracy, he entered a *nolle prosequi* against two, who were examined as witnesses against the others.

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had been severally indicted, when they would have been witnesses for each other (x), they must therefore, as it seems, be also at least equally competent as witnesses against each other (y). (1).

(x) 2 Hale, 280. 2 Rol. Ab. 685, pl. 3, *supra*, 22.

(y) *Supra*, 22. But see B. N. P. 285, where it is said, that the Court would not allow the attorney-general, on the trial of an information for a misdemeanor, to examine a defendant for the King, without entering a *nolle prosequi* as to him. But *qu.* whether in that case the witness had not been put upon his trial at the same time. See *Ward v. Man*, 2 Atk. 229. Macnally, 55. In the case of *R. v. Lafone*, 5 Esp. C. 154, on an indictment for obstructing excise officers, Ld. Ellenborough would not permit co-defendants who had suffered judgment by default, to be examined as witnesses for the defendant who was tried, saying, that he had never known such evidence admitted on an indictment for a joint offence. The cases on the subject were not, it seems, adverted to on that occasion. In *R. v. Fletcher*, 1 Str. 633, one who had suffered judgment by default on a joint indictment for an assault, and had been fined, and had paid a shilling, was admitted as a witness for the other defendant. There indeed the witness had been fined, but it is difficult to say how the circumstance, that the judgment has been pronounced and executed on the witness, can make any difference as to his competency, or how his giving evidence can at all alter or affect his legal situation. It has been held, that upon several indictments against three for perjury in proving a bond, each was a witness for the others. *R. v. Bilmore, Gray, and Harbin*, 2 Hale, 280. And see also *Gunston v. Downs*, *ibid.* & 2 Rol. Abr. 685, pl. 3. According to the same principle, if each had been separately indicted for a battery or larceny, the others would have been competent witnesses; for the same reason applies which is given by Ld. Hale, viz. that they are not immediately concerned in the trial against the third, and therefore they would, it should seem, be also competent, although they were all to be included in one in-

(1) [A party in the same indictment cannot be a witness for his co-defendant, until he has been first acquitted or convicted—whether they plead jointly or separately. *The People v. Bill*, 10 Johns. 95. But if there be no proof against one of the defendants, it has been held in Connecticut, that he may be admitted as a witness. *The State v. Shaw*, 1 Root, 134. *Secus*, in New Jersey. *The State v. Carr & al.*, 1 Coxe's Rep. 1. If, however, circumstances are proved, from which it is possible for the jury to presume facts amounting to guilt, a defendant in an indictment cannot be a witness. *Pennsylvania v. Leach & al.*, Addison's Rep. 353. In the case of *The State v. Alexander & al.* 2 Rep. Con. Ct. 171, where the evidence against one of the defendants was not sufficient to convict him, the court refused to strike his name out of the indictment for the purpose of making him a witness for the others, without the assent of the Attorney-General—though they might advise his acquittal.

Where three had been bound over to answer to a charge of maihem, and one died before the finding of the indictment, his declarations, made shortly before his death, were held to be inadmissible on behalf of the other defendants. *Respublica v. Langcake & al.*, 1 Yeates, 415. See *Ante*, p. 459, & *seq.*]

* An accomplice is also a competent witness for his associates where he is not indicted at all, or where he is separately indicted (z); perhaps, also, where he is jointly indicted, as where he has let judgment go by *default (a). Where however the offence is of such a nature that an acquittal of his associates would enure to his own acquittal, he is incompetent. Thus an accessory before or after the fact would be incompetent as a witness for the principal, and a co-conspirator would be incompetent to discharge his associates (b).

* 764

Competency of
a co-defendant.

In civil cases it seems that an accomplice, or joint wrongdoer, who is not a party to the record, is a competent witness on either side, unless he be in some way answerable over to the defendant for the consequence of his conduct, as an agent is, where the action is brought against the principal in respect of the negligence of the agent (c).

It has even been held that a joint trespasser is a competent witness for the plaintiff, although a recovery against the defendant would discharge the action against him-

dictment, which in legal effect operates as a several indictment as to each. See *R. v. Frederick and Tracy*, 2 Str. 1095, where, upon an indictment against several for an assault, the reason for refusing to admit the wife of one as a witness for another defendant was, that it was impossible to separate the case of the two defendants. *R. v. Sherman*, Rep. Temp. Hardw. 303. It has indeed been suggested, that if one who suffered judgment by default were a competent witness, one defendant by so doing might protect the rest, (5 Esp. C. 155, Phillipps on Ev. 79); assuming it to be probable that one of several delinquents would sacrifice himself for the salvation of the rest; it would by no means be a necessary consequence that he would be able to screen them, his credit would be open to the observation of the Jury, and be subject to much suspicion. It is also to be observed, that the prosecutor may in general avail himself, if he chooses, of the testimony of a *particeps criminis*, even where the latter has a bias on his mind in favour of conviction, and therefore there seems to be no sufficient reason why a defendant should not avail himself of similar testimony.

(z) *Supra*, tit. *Accomplice*.

(a) *Supra*, 762, note (y). So if there be no evidence against one. See the case of the ship Bounty, 1 East, 313, n.

(b) *Supra*, 242, note (g). *Vide etiam, Supra*, 412, note (g). *A.* wins money of *B.* by means of *C.* and *D.* packing the cards; upon an indictment against *C.* and *D.*, *A.* cannot be a witness, because interested in the conviction, for he might give the record in evidence on a prosecution against himself, as *particeps criminis*. *R. v. Backwell & others*, Cor. Lee, C. J. Sitt. after Mich. T. 15 Geo. 2; 1 Mod. 283, note to the 4th edit.

(c) *Infra*, 768.

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co-defendant.

self (*d*). This, however, is at all events a fact which tends to lessen his credit (*e*). This practice, which is not unfrequent, is not easily reconcileable with strict principles, for a discharge from the costs and damages of an action of trespass seems to constitute a present legal interest in the event of the cause, and the record would be evidence for the witness.

* 765
Co-trespasser.

* A co-trespasser, or other joint wrong-doer, who is not a party to the record (*f*), is in general a competent witness for the defendant; for the record would not be evidence for him in another action, and his interest is rather on the other side, since, if the plaintiff failed in obtaining compensation against the present defendant, he might afterwards attempt to recover it from the witness. The defendant in an action of trespass pleaded, that R. Mawson, who was named in the *simul cum*, had paid the plaintiff a guinea in satisfaction. It was held by Eyre, C. J. that

(*d*) B. N. P. 286. In the case of *Barnard v. Dawson*, Guildhall, Sitt. after Mich. T. 1796, Ld. Kenyon rejected the testimony of a co-trespasser when called as a witness for the plaintiff. But in the case of *Chapman v. Graves & others*, 2 Camp. 333, n. Le Blanc, J. admitted a co-trespasser as a witness for the plaintiff. But it has been said, that the learned Judge (Le Blanc) who admitted this evidence, afterwards doubted as to the propriety of the decision. See *Lethbridge v. Phillips*, 2 Starkie's C. 544. In the case of *Chapman v. Graves*, above cited, Le Blanc, J. held that a joint-trespasser who had let judgment go by default, was not a competent witness for the plaintiff. And see *Brown v. Brown*, 4 Taunt. 752.

In *Luttrell v. Reynell*, 1 Mod. 282, a co-trespasser was held to be a competent witness for the plaintiff, although it was said that his credit was lessened, because he swore in his own discharge; but it was held that those in the *simul cum* were no witnesses. *Vide etiam*, *King v. Bedder*, 1 Sid. 237; *Page v. Cook*, Stry. 401, 404. *Creswick's case*; Clayt. 37; *Moore*, 11, pl. 33; so in *Morris v. Daubigny*, 5 Moore, 319, a co-trespasser not joined was held to be competent to prove the trespass; because, according to the report, "the plaintiff cannot afterwards sue the witness, as the verdict in that cause could neither be used nor given in evidence for or against him."

A. lends a picture to *B.* who without authority sends it to the house of *C.* where it is damaged in consequence of negligence; in an action by *A.* against *C.*, *B.* was held to be a competent witness. *Lethbridge v. Phillips*, 2 Starkie's C. 544. But where *A.* drove *B.* in his cart for hire, and *B.* was injured by *B.*'s negligently driving his cart against that of *A.*—the latter, it was held, was not a competent witness to prove the negligence of *B.* Cor. Abbott, C. J. Guildhall Sitt. after Hil. T. 1823. See Post, 1732.

(*e*) B. N. P. 286.

(*f*) As to the competency of parties which rests upon other considerations, as well as that of an interest in the event, see tit. *Parties*.

Mawson was a competent witness for the defendant, for what he had to prove could not be given in evidence in another action, and he admitted himself to be a trespasser(*g*).

Competency of
a co-trespasser.

It has been said, that if the plaintiff can prove the persons named in the *simul cum* in trespass guilty, and parties to the suit, by producing the process, and prove also an ineffectual endeavour to arrest them, or that the process was lost, the defendant shall not have the benefit of their testimony (*h*). The grounds of this decision are not very obvious; a co-defendant under such circumstances is neither immediately interested in the event of the suit, nor in the record, for the purposes of evidence (*i*), and he is no party to the trial of the issue. In Gilbert's Law of Evidence (*k*) this case is propounded. Trespass against *A.* and *B.* for two horses, evidence against *A.* as to one; and the question * is, if he may be a witness for *B.*, in relation * 766 to the other; and the learned writer observes thus: It seems that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself; but if they were not a single fact, but two distinct trespasses, at different times and places, but arbitrarily joined in the same declaration, then they may be witnesses, one for the other, because the oath of one of them has no influence on the crime laid to his charge, but merely goes in discharge of the other. A *quare* is however added to this case, which certainly goes to a great extent. According to modern practice, however, there would be little difficulty in the solution. If the plaintiff could not affect *A.* and *B.* jointly with respect to either of the horses, he would be put to his election against which of them he would proceed, for he could not recover jointly against both for the separate trespass of either. Having made his election to proceed against one, the other would be entitled to his acquittal, and would then be a competent witness for the former.

Where, however, a co-trespasser is made a defendant, he is not in general competent as a witness on either side (*l*); but if he has been made a co-defendant by mistake, the Court will, on motion, give leave to strike his

(*g*) *Poplet v. James*, Trin. 5 Geo. II. B. N. P. 286.

(*h*) *Reason v. Evobank*, Hil. 1 Geo. I, *per omnes Just.* B. N. P. 286. *Lloyd v. Williams*, Rep. Temp. Hardw. 123. *Hill v. Fleming*, *ibid.* 264.

(*i*) His interest is rather the other way.

(*k*) 135, 2d edit.

(*l*) *Per Le Blanc*, J. 2 Camp. 334, *n*.

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a co-trespasser.

name out of the record, even after issue joined (*m*); for it seems to be a general rule that a plaintiff can in no case examine a defendant, although nothing be proved against him (*n*). But if there be no evidence to charge one co-defendant, he may, after all the evidence for the rest has been closed, be acquitted, *and examined as a witness for the rest (*o*); for otherwise the plaintiff might exclude all the defendant's witnesses by making them co-defendants (1).

Where a co-trespasser lets judgment go by default he is

(*m*) B. N. P. 285. 1 Sid. 441.

(*n*) B. N. P. 285.

(*o*) Gilb. L. Ev. 134, 2d edit. 1 Hale, 307; 1 East, 313.

(1) [If a plaintiff includes persons in his suit against whom no evidence is offered, they may be witnesses. *Wakely v. Hart & al.* 6 Binney, 319. *Barney v. Cullar & al.* 1 Root, 489. *Brown & al. v. Howard*, 14 Johns. 119. But if there be any, even the slightest evidence against them, they are inadmissible. 14 Johns. *ubi sup.* *Van Deusen & al. v. Van Slyck*, 15 Johns. 223.

If the plaintiff proceeds to issue and trial against some of the defendants in trespass, but does not rule the others to plead, the latter may be witnesses for the former. 6 Binney, *ubi sup.* And in trespass against three joint trespassers, if two are taken and the other returned not found, the latter is a competent witness for the other two. *Stockham v. Jones*, 10 Johns. 21. *S. P. Purviance v. Dryden*, 3 Serg. & Rawle, 402. See also *Gibbs v. Bryant*, 1 Pick. 118; *Norman v. Norman & al.* 2 Yeates, 154, in actions of assumpsit. Where one of several who are sued as joint trespassers is found not guilty, he may be a witness for the others in a petition for a new trial, although the plaintiff has brought a petition against him. *Ranney v. Church*, 2 Root, 420. See also *Church v. De Wolf*, *ibid.* 282. Swift's Ev. 73.

In trespass against several who sever in the defence, they cannot demand separate trials for the purpose of using a co-defendant as a witness. *Dougherty v. Dorsey*, 4 Bibb, 207.

A defendant in chancery, who is charged by the plaintiff as fraudulently colluding with his co-defendant, in regard to transactions which the bill seeks to impeach, cannot be a witness for his co-defendant—nor can he be examined even *de bene esse* before the master, where the cause has been referred to the master, by consent, to take an account. *Whipple v. Lansing*, 3 Johns. Ch. Rep. 612. It seems, however, that a party charged as combining with others in a fraud against which relief is sought, and therefore made a defendant, but no particular relief prayed against him, may be a witness for his co-defendants, though liable for costs. *Neilson v. McDonald*, 6 Johns. Ch. Rep. 201. Where a defendant appears to have no interest in the cause, but is made a party *pro forma* merely, he may be examined as a witness for his co-defendant, although the plaintiff has filed a replication to the answer of such defendant. *Kirk v. Hodgson*, 2 Johns. Ch. Rep. 550. See *supra*, Vol. I. 290, and note (1).]

a competent witness for a co-defendant (*p*), but he is not a competent witness for the plaintiff (*q*). So a co-defendant in ejectment, who lets judgment go by default, is a competent witness for another defendant (*r*).

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IV.

Agents.—Where a *servant* acts for his master in the common course of business, he is, as has already been seen, competent from the necessity of the case (*s*); such testimony has been deemed to be admissible upon a penal action against the master, for selling coals without a bushel (*t*). Where money has been paid by the servant for his master (*u*); where the son has received money for his father, and paid it over to the * defendant (*x*); where a porter has delivered goods for his employer (*y*); where a carrier has been employed to convey goods, although he was responsible to the consignor (*z*). In an action against a captain for deserting the vessel, a mariner who was on board was held to be a competent witness to prove that there was a necessity for leaving the ship, although he had given a bond to the captain not to desert (*a*). * 768

In proof of the sale of goods, the *factor* is competent (*b*) Factor.

(*p*) *Wara v. Haydon & Ventom*, 2 Esp. C. 552. And the same point was ruled by Wood, B. Lancaster Spring Ass. 1809, cited 2 Camp. 334, *in note*. And see *Chapman v. Graves*, *ibid.* [See vide 6 Binney, 319. 1 Day, 33.]

(*q*) Per Le Blanc, J. *Chapman v. Graves*, 2 Camp. 334, *n.* who said, that the general rule was, that no person who was a party to the record was admissible as a witness, and he distinguished between that case where the witness was called to inculcate the defendants, and those (cited in the last note) where he is called to exculpate them, and said, that where there was an innovation he was not disposed to extend it.

(*r*) *Dormer v. Fortescue*, Mich. 9 Geo. II. B. N. P. 285. But if he plead, and by that means admit himself to be a tenant in possession, the Court will not upon motion strike out his name, but *semble*, if he consent to let a verdict pass against him for as much as he is proved to be in possession of, he ought to be admitted as a witness for a co-defendant. B. N. P. 286.

(*s*) Vide *supra*, 753. And see *Duel v. Harding*, 1 Str. 595. *Lewis v. Fog*, 2 Str. 944. *Cock v. Wortham*, 2 Str. 1054. *Tullidge v. Wade*, 3 Wils. 18. Contra, *Dunsley v. Westbrowne*, 1 Str. 414.

(*t*) Per Lee, C. J. *East India Company v. Gosling*, B. N. P. 289.

(*u*) *Theobald v. Treggott*, 11 Mod. 262. [*contra.*]

(*x*) 1 Salk. 289. B. N. P. 289.

(*y*) B. N. P. 289.

(*z*) Fort. 247.

(*a*) *East India Company v. Gosling*, B. N. P. 289. 3 Ford's MSS. 89. But (*semble*) this would be evidence without resorting to the exception from necessity.

(*b*) 1 P. Wms. 429. *Bent v. Baker*, 3 T. R. 27. Pr. in Ch. 207.

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Factor.

to prove the contract, even where he is to receive a percentage for his own commission (c); or although he is to receive the excess of the price beyond a specified sum for his own use (d). So where the payee of a bill of exchange indorsed it in blank, and delivered it to an agent to procure acceptance, in an action of trover by the payee against the drawee, the agent is a competent witness to prove that he left the bill with him for acceptance (e) (2). The rule

(c) *Dixon v. Cooper*, 3 Wils. 40. And see *Lloyd v. Archbould*, 2 Taunt. 324.

(d) *Benjamin v. Porteus*, 2 H. B. 590.

(e) *Lucas v. Haynes*, 2 Ld. Raym. 671.

(2) [Agents are competent witnesses, *ex necessitate*. *Mackay v. Rhineland*, 1 Johns. Cas. 408. *Caters v. Billings*, *ibid.* 270. *Jones v. Hake*, 2 ib. 60. *Abbot v. Sebor*, 3 ib. 39. *Stewart v. Kip*, 5 Johns. 256. *Fisher v. Willard*, 13 Mass. Rep. 379. *Phillips & al. v. Bridge*, 11 ib. 246. *Müller v. Hayman*, 1 Yeates, 23. *Steward v. Richardson*, 2 Yeates, 89. *Strafford Bank v. Cornell & al.* 1 N. Hamp. Rep. 192. *Phelps v. Sinclair*, 2 ib. 554. *Alston v. Jones*, 1 Murphey, 45. *Alexander v. Emerson*, 2 Littell's Rep. 27. *Burlingham v. Deyer*, 2 Johns. 189. *Eastman v. Hodges*, 1 Chip. Rep. 101.

As the power of an agent to sell lands must be in writing, and proved by indifferent witnesses (*Girard's Lessee v. Krebs & al.* cited 2 Yeates, 38; *Lessee of Plumsted v. Rudebagh*, 1 Yeates, 502) therefore, in Pennsylvania, an agent has been held incompetent to prove that a written authority had been given to him and was mislaid. *Nicholson's Lessee v. Miffin*, 2 Dallas, 146. S. C. 2 Yeates, 38. But it seems that an agent may prove the mere fact of the loss of a written power. *Meredith's Lessee v. Mucoss*, 1 Yeates, 200. In an action to recover the difference in a stock contract, the broker is a competent witness to prove that he had verbal authority to make the contract for the plaintiff. *Livingston & al. v. Swanwick*, 2 Dallas, 300. In Massachusetts, an agent appointed by writing is not a competent witness to prove his agency, unless the writing be lost or destroyed. *Proprietors of Kennebeck Purchase v. Call*, 1 Mass. Rep. 484. In Kentucky, an agent, whose authority is created by letter, is a competent witness to prove its contents, if lost. *Kirkpatrick v. Cisna*, 3 Bibb, 244. So an agent is there held competent to prove his authority or any other fact in the case. *Connelly v. Chiles*, 2 Marsh. 242. Where A. received money for B. and paid it to C. who represented himself as authorized by B. to receive it; in an action by B. against A—C. was held, by the court in N. Carolina, to be a competent witness to prove that A. authorized him to receive the money of B. *Blackledge v. Seales*, 1 Murphey, 179.

An auctioneer, who has sold goods to A. and committed them to the care of his servant, to be delivered to the vendee on his performing the conditions of sale, is a competent witness for the plaintiff, in an action of replevin brought by the servant against A. who had obtained possession by artifice and deceit. *Harris v. Smith*, 3 Serg. & Rawle, 20. An agent, who has received several sums of money on account of trespasses alleged to have been committed on lands of his principal, and which he promised to refund, if his principal

seems to extend to all acts done by the agent, as far as he acts according to the direction of his principal in the usual course of business. But where an action is brought against the principal for the negligence of his agent, and evidence has been given of such negligence, the agent is in general incompetent without a release, for there the verdict against the principal would be evidence in an action * brought by him against the agent (f), and the exception * 769 from necessity does not apply, because culpable acts of negligence and misconduct are not to be considered as arising in the common and ordinary course of dealing; they are not so usually confined, as matters of trade and contract are, to the knowledge of the agent alone; and the agent himself stands in a very different situation; where the subject-matter of his testimony arises in the course of his ordinary employment, there is not so strong a reason to discredit him as there is where his misconduct is made the very ground of the proceeding, and where he would ultimately be responsible for the whole of the damages recovered. Accordingly in an action against the owner of a

Agent when competent.

(f) *Vide supra* 62. 749. And see 4 T. R. 590.

should not recover in an action against a particular trespasser, is a competent witness in that action. *Renaudet v. Crocken*, 1 Caines' Rep. 167. An agent or broker, authorized to purchase goods on certain terms, is a competent witness in a suit between the vendor and vendee. *Bailey & al. v. Ogden*, 3 Johns. 399. One who purchases land in his own name is competent to prove that he acted in the purchase as agent and trustee of another, to whom he afterwards conveyed the land. *Brown v. Downing*, 4 Serg. & Rawle, 497. A commission merchant is a competent witness for the owner of goods, in an action against an officer for seizing them as the property of the merchant. *Jones v. Sinclair*, 2 N. Hamp. Rep. 319. *Whiting v. Bradley*, *ibid.* 79. A consignee of goods, refusing to receive them on his own account, and afterwards selling them as agent of the consignors, is a competent witness for the latter, in an action by them against the purchasers for the price of the goods sold, although he has indorsed the bill of lading in blank. *Brown & al. v. Babcock & al.* 3 Mass. Rep. 29.

But one who has sold goods, as the agent of another, upon a *del credere* commission, is not a competent witness in an action by the principal against the purchaser, although the agent has a release from the principal. *New York Slate Company v. Osgood & al.* 11 Mass. Rep. 60. And where a contract for the transfer of stock was made with A. as a principal, upon which he brought an action in his own name, and became nonsuit; it was held that in a subsequent action by B. on the same contract, A. could not be received as a witness to prove that he acted as agent for B. *Anderson v. Hayes*, 2 Yeates, 95.]

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competent.* 770
Witness liable
to costs.

coach or vessel, for the negligence of the coachman or sailor, the latter are not competent (*g*) (1).

In an action against the master of a ship for running down another, the pilot is not competent (*h*) without a release (*i*) (2). So in an action against the sheriff for the misconduct of the officer, the latter is not competent (*k*). So in an action against the New River Company, to recover for damages done to a horse by the bursting of a pipe, after evidence that information had been given to a turncock, an agent of the defendant, as to the dangerous state of the pipe, which, had it been attended to, would have prevented the mischief, it was held that the agent was incompetent as a witness to disprove the negligence (*l*).

* *Costs*.—Any engagement to pay the costs, or any portion of them, on either side, creates an obvious interest on that side, and accordingly disqualifies the witness, but he may be rendered competent by a release by the attorney, or other person to whom he has engaged himself to pay the costs. And on this ground executors and trustees are in many instances excluded from giving testimony, although

(*g*) 4 T. R. 590. A broker who has made a distress is not competent to show that the distress was not excessive. *Field v. Mitchell*, 6 Esp. C. 71.

(*h*) *Martin v. Henrickson*, 2 Ld. Raym. 1007. 1 Salk. 287. *Green v. New River Company*, 4 T. R. 589.

(*i*) *Jarvis v. Hayes*, 2 Str. 1083.

(*k*) *Powell v. Hord*, 2 Ld. Raym. 1411. The reason given in the report is, that the officer has given a bond to the sheriff for his proper conduct; but he would be incompetent on the general principle, although no bond had been given. A party who has deposited money with the sheriff in lieu of bail, under the statute, is not a competent witness for the defendant. *Lacon v. Higgins*, 3 Starkie's C. 178.

(*l*) *Green v. The New River Company*, 4 T. R. 589. See *Miller v. Falconer*, 1 Camp. 251; 15 East, 474; 3 Camp. 516; 2 Ld. Ray. 1007.

(1) [The master is not a competent witness for the owner, in an information in rem for a forfeiture of a vessel caused by the master's misconduct. *The Hope*, 2 Gallison, 48. Nor is he a competent witness for the owner to prove a loss of goods to have been occasioned by stress of weather. *Gardner v. Smallwood*, 2 Hayw. 340. And in an action against the principal for negligence and misconduct in the purchase of goods, the broker, who made the contract for him, cannot be called to prove that there was no negligence or misconduct, without a release from the principal. 1 Holt's N. P. Rep. 139, *Geyers & al. v. Mainwaring*.]

(2) [In an action against the master of a vessel for negligently running foul of the plaintiff's vessel and injuring it, the owner of the vessel was held to be a competent witness for the defendant. *Case v. Reeve*, 14 Johns. 79.]

they having no private interest in the subject-matter of the suit, for they are still incompetent if they are legally liable to the costs of the suit (l) (1). So one who has advanced money in support of a suit, for which security is given, partly on the thing demanded, is not competent, although the remaining security be sufficient to cover his demand (m). The prosecutor's claim to costs upon an indictment removed by *certiorari*, will not, it seems disqualify him (n).

Witness liable
to costs.

A creditor is in general incompetent to increase the fund out of which he is to be paid (2). Thus a creditor of a

(l) *Infra*, p. 785. [*Beard v. Cowman*, 3 Har. & M'Hen. 152.] As to the liability to costs in cases of bills of exchange. *vide Supra* p. 299, 300, 301. See also further as to costs, *Supra* p. 752.

The governors and directors of a charity who are made liable to costs upon appeal in the first instance, are not competent as witnesses, although they are entitled to be reimbursed. *R. v. The Directors of the Poor of St. Mary Magdalen, Bermondsey*, 3 East, 7.

(m) Per Holt, C. J. *Norris v. Napper*, 2 Ld. Raym. 1007, 8.

(n) *Infra*, 773.

(1) [In *Cochran v. Cochran & al.* 1 Yeates, 134, an executor plaintiff, who had no interest in the residue of the estate, was held to be incompetent, though the costs were offered to be lodged in the court. In *Heckert v. Haine*, 2 Binney, 16, on the issue of *plene administravit*, the administrator was not allowed to become a witness by pleading his interest and paying costs, because the issue might be found against him, and he be rendered personally liable for the debt. So one of two executors, defendants, was not permitted to be a witness for the defendants, on the pleas of *non assumpsit*, payment and sett-off, though all the costs that had accrued, and a sum equal to those which could accrue to the end of the suit, had been paid. *Conrad v. Keyser*, 5 Serg. & Rawle, 370. See also *Fox & al. v. Whitney*, 16 Mass. Rep. 118. *Sears v. Dillingham & al.* 12 ib. 360.]

(2) [In general, a creditor of a deceased person is a competent witness, though his testimony tends to increase the estate of the deceased. *Youst & al. v. Martin*, 3 Serg. & Rawle, 427. *Innis v. Miller*, 2 Dallas, 50. But if his debt is clearly to be affected by the event of the suit, or he acknowledges that he expects to gain by the event of the suit, he is incompetent. *Same cases*. See also *Erb v. Underwood*, 3 Yeates, 172. *Green's case*, 2 Dallas, 268. 2 Yeates, 166. *Hillhouse v. Smith*, 5 Day, 432. See note (o) on next page.

A co-heir, or co-next of kin, is not a competent witness for the plaintiff, in a suit brought for an account of a trust fund created for the benefit of all the heirs, or next of kin. *West v. Randall & al.* 2 Mason's Rep. 181. In an action by an executor, the heir is not a competent witness for the plaintiff. *White v. Derby*, 1 Mass. Rep. 239. But if he release all his interest in the action, he is competent in Massachusetts—unless, perhaps, when there is real estate of the deceased, which may be relieved from the claims of creditors by a recovery in the action. *Boynton v. Turner*, 13 Mass. Rep. 391. *Secus*, in Virginia. *Rowt v. Kile*, Gilmer, 202. An heir or distributee, for whose use a suit is brought on the administration bond, cannot be a witness for the plaintiff. *Ordinary v. Bracey*, 2 Bay, 542.]

PART
IV.

In criminal
proceedings.
The party in-
jured.

* 771

deceased person is not a competent witness for the executor or administrator to increase the estate (*o*). And a creditor of a bankrupt is not competent to increase the fund out of which he may receive a dividend (*p*).

It seems to be now settled, that the party injured is a competent witness for the prosecution in all cases, except that of forgery (*q*); or unless some private compensation is given by a statute to the party injured, in the nature of damages (*r*); for it is not to be presumed * that a witness in a public prosecution is actuated by revengeful or improper motives, and he has in general no *legal* interest in the conviction beyond that of any other witness (1). It was formerly held, very generally, that the party defrauded was not a competent witness upon an indictment for the fraud, except in some instances *ex necessitate* (*s*); and, therefore, that the plaintiff was not competent to prove the perjury of the defendant in his answer (*t*) to a bill of the witness in equity.

Such decisions seem to have been founded on the supposition that the verdict would be admissible evidence for the witness in a subsequent proceeding, so as to entitle him to a remedy for the injury, or to protect him against the effects of the fraud. But this doctrine has long been ex-

(*o*) *Craig v. Cundell*, 1 Camp. 381. A creditor who has a power of attorney to receive the amount recovered is not competent. *Powel v. Gordon*, 2 Esp. C. 735. [*Peyton v. Hallet*, 1 Caines's Rep. 363.] But a creditor of an intestate is a competent witness for the administratrix. *Paull v. Brown*, 6 Esp. C. 34; and see *Carter v. Pearce*, 1 T. R. 163. Unless the estate be insolvent. *Craig v. Cundell*, 1 Camp. 381. A creditor of a bankrupt who has assigned his debt, is competent. *Heath v. Hall*, 4 Taunt. 326.

(*p*) 2 Camp. 301. And *Shuttleworth v. Bravo*, 1 Str. 507. And *supra*, 215. [*Phoenix v. Assignees of Ingraham*, 5 Johns. 427.]

(*q*) See tit. *Forgery*; and *supra*, 759. [583, note, (1).]

(*r*) *R. v. Boston*, 4 East, 572. Gilb. L. Ev. by Loft, 221.

(*s*) Per Holt, C. J. *R. v. Macartney & others*, 1 Salk. 286. Per Twisden, J. *R. v. Paris*, 1 Vent. 49. 1 Sid. 431.

(*t*) *R. v. Nunez*, 2 Str. 1043.

(1) [The owner of a stolen bank-bill is a competent witness on an indictment against the offender. *The State v. Casados*, 1 Nott & M'Cord, 91. On the trial of a defendant for playing with false dice, the party cheated was admitted as a witness. *The King v. Chapman*, stated by M'Kean, C. J. 1 Dallas, 111, and cited 2 ib. 240. 2 Yeates, 4. On an indictment for murder against a negro servant for years, the master is a competent witness for him. *The State v. Aaron*, 1 Southard's Rep. 231.

But the person entitled to restitution is held, in North Carolina, not to be a competent witness on an indictment for forcible entry. *The State v. Fellows*, 2 Hayw. 340.]

ploded (*u*); and it seems now to be perfectly settled that the record of conviction would not be admissible evidence in any civil proceeding. In the case of *The King v. Broughton* (*x*), which was a prosecution for perjury, founded on the defendant's answer to a bill in equity, Lee, C. J. notwithstanding the previous decisions (*y*), admitted the testimony of the plaintiff in equity; there, however, it appeared that the equity suit was at an end. But in the case of *The King v. Boston* (*z*), where perjury had * been assigned * 772 on the defendant's answer, the plaintiff was held to be competent although the equity suit was still pending. And this, on the ground that a court of equity would not look at a conviction founded on the testimony of the plaintiff, although it was also founded on other circumstances confirmatory of his testimony. Accordingly, the witness is competent upon an indictment for tearing a promissory note, payable to him (*a*), or for extorting a bond from him (*b*). Upon an indictment for usury, although he was the borrower of the money (*c*), and has not repaid it. So where money has been extorted from him under threat of imprisonment, or corporal injury (*d*); for cheating him of money by false pretences (*e*); so, upon an information for fraudulently procuring the witness to execute a *cognovit* (*f*).

A witness is competent notwithstanding an expectation

(*u*) See *Ld. Mansfield's* observations in *Abrahams v. Bunn*, 4 Burr. 2251. And *Ld. Harwicke's* in *R. v. Bray*, C. T. Hard. 359.

(*x*) 2 Str. 1229.

(*y*) *R. v. Whiting*, 1 Salk. 283. 1 *Ld. Raym.* 396. See *Cas. Temp. Hardw.* 359. *R. v. Nunez*, 2 Str. 1043. *R. v. Ellis*, 2 Stra. 1104. *R. v. Watt*, Hardr. 331.

(*z*) 4 East, 572. And see the case of *Bartlett, v. Pickersgill* there cited, where the *Ld. Keeper* dismissed a petition for leave to file a supplemental bill in nature of a bill of review, the defendant having been convicted of perjury, committed in his former answer on the evidence of the plaintiff.

(*a*) *R. v. Moise*, 1 Str. 595. 1 Sid. 431. 1 Vent. 49, contrary to the opinion of *Twisden*.

(*b*) *R. v. Brent*, cited *Rep. Temp. Hardw.* 265.

(*c*) *R. v. Sewell*, 7 Mod. 118.

(*d*) *Ibid.*

(*e*) *R. v. Macartney & others*, 1 Salk. 286.

(*f*) *R. v. Paris*, 1 Sid. 431. 1 Vent. 49. On an information for building locks on the river Thames, one who contributed to carry on the suit, and who was privately injured by the public nuisance, was held to be competent. *R. v. Clarke*, 12 Mod. 615; 12 Vin. Ab. I. 27.

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prosecutors.

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that he shall in the event of conviction obtain a return of his goods by virtue of the statute (*f*) (1). And so he was in the case of an appeal of robbery, although the object is in part the recovery of his property.

So a witness is competent although he expects a reward in case of conviction, by virtue of particular statutes (*g*), by proclamation, or in consequence of * the voluntary offer of a reward which has been held out in order to ensure the apprehension and conviction of offenders (*h*); for these statutes were enacted for the express purpose of stimulating activity and diligence in the prosecution of offenders, and of rendering their conviction more certain; but the very opposite effect would take place if prosecutors and others were in consequence of their expectation of such rewards to be disqualified as witnesses, whence, it seems, the intention of the Legislature may be inferred that such witnesses should still be deemed competent. In the case of appeals, the objection was never allowed to operate. At all events the admission of such testimony may be referred to the principle of necessity, which does not operate so powerfully in any other class of cases (*k*).

Where a reward is offered by any private person or, body of persons, the witness would nevertheless be competent on another ground; since the public had an interest in his testimony previous to the offer of the reward, which could not be defeated by the voluntary act of any individual.

The principle lately adverted to applies also to cases where an indictment has been removed by *certiorari*, for if the prosecutor's claim to costs took away his competency,

(*f*) Hen. VIII. At common law the owner was entitled to re-take the goods, unless the property had been changed by waiver, seizure by the King, or sale in market overt. East's P. C. 759. Gilb. Ev. 222.

(*g*) *Supra*, 20. [*State v. Bennet*, 1 Root, 249. *State v. Coulter*, 1 Hayw. 3.]

(*h*) *R. v. Ld. G. Gordon*, Leach, 353. *R. v. Dylone*, 4 Sup. Vin. Ab. F. pl. 11. Ons. N. P. 257. Esp. N. P. 713. *Rookwood's case*, 4 St. Tr. 684.

(*i*) Gilb. Ev. 222.

(*k*) See the observations of Parker, C. J. in *The Queen v. Muscot*, 10 Mod. 193.

(1) [So one from whom goods have been stolen is a competent witness on the trial of the thief, although he is entitled by statute to satisfaction from the future earnings of the convict, and a recompense from the public treasury for the expense of prosecution. *Commonwealth v. Moulton*, 9 Mass. Rep. 30.]

the Act of Parliament (l), which was intended to discountenance the removal of suits by *certiorari*, would give the greatest encouragement to such removals (m); besides, it seems to be clear * that a defendant cannot by his own act * 774 cast an interest on the prosecutor so as to disqualify him (n). It seems also that the prosecutor of an indictment for not repairing a highway is competent, although he may in the result be liable to costs (o). Competency of prosecutors.

But in *all cases* the motive which may influence the mind of the witness is a matter for the consideration of the Jury, and if they can infer from his situation or conduct that such motive is an improper one, they are at liberty to make deductions from the credit which they give to his testimony accordingly.

Where a statute gives a specific remedy to the party injured he is as much disqualified for a witness in a criminal prosecution as if he sought the remedy by a civil action (1); and therefore, upon an indictment for perjury upon the statute, the party injured is not a competent witness, since the statute gives him 10*l.*, although he would have been a good witness upon an indictment for perjury at common

(l) 5 & 6 Will. & Mary, c. 11.

(m) Per Parker, C. J. 10 Mod. 194.

(n) *Vid. supra.* At the York Spring Ass. 1821, the prosecutor of an indictment for not repairing a road, which had been removed into the K. B. by *certiorari*, was examined without objection. See *tit. Highway.*

(o) See *R. v. Inhabitants of Hammersmith*, 1 Starkie's C. 357. n.

(p) 5 Eliz. c. 9.

(1) [In Pennsylvania, the informer cannot be a witness on an information, though he releases his right to a moiety of the goods—being liable for costs. *Rapp v. Le Blanc & al.* 1 Dallas, 63. In South Carolina, an informer, unless saved by the statute, or from the necessity of the case, is not competent; but he may release his interest. *City Council v. Haywood*, 2 Nott & M'Cord, 308. *Van Evour v. The State*, *ibid.* 309. n. On an indictment under the swindling act, the party aggrieved is not a competent witness, as on conviction he would be entitled to double the value of the property. *The State v. Vaughan*, 1 Bay, 282. But in Kentucky, the person on whose information a presentment has been made, is a competent witness to support it—not being liable to costs on failure of the prosecution. *Commonwealth v. Oliver*, 3 Bibb, 474.

In a *qui tam* action, where the party proceeds as well for damages as for a breach of the peace, he cannot be admitted as a witness. *Bill v. Scott, Kirby*, 62. And on an indictment for taking excessive usury, the informer, being entitled to a moiety of the penalty, in Massachusetts, is not a competent witness. *Semb. Commonwealth v. Frost*, 5 Mass. Rep. 53.]

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law (*q*). But the former rule still prevails with respect to indictments for the forgery of *negotiable instruments*; and it is still held, that no one can prove the forgery upon whom the instrument, supposing it to be genuine, would be binding (*r*).

* An acting *executor* is competent to support the will by proof of the sanity of the testator, although he may become liable as an executor *de son tort* (*s*). So one who has acted under the first will is competent to prove a codicil setting up the first (*t*). And it seems that executors and trustees in general may be witnesses as to the trust-estate, provided they take no beneficial interest (*u*); it has been decided so long ago as the time of Lord Hale, that an executor having no interest in the surplus is a good witness to prove the will in a cause relating to the estate (*x*), and this has been followed by many other decisions to the same effect (1).

In an action against an administrator, one of his sureties for the due administration of the effects is a competent witness to defeat the action (*y*) (2), for the bare possibility that an action will be brought is no objection to competency; and in order to disqualify a witness it is necessary to show that he will derive a certain benefit from the re-

(*q*) B. N. P. 289. 2 Haw. c. 46.

(*r*) *R. v. Dodd*, Leach. 184, 3d edit. Hardr. 332. 3 Salk. 172, pl. 4. Co. Litt. 352. 2 Inst. 39. *R. v. Russell*, Leach, 8. *R. v. Rhodes*, 2 Str. 728. Transfer of stock. Salk. 283. *Shank v. Payne*, 1 Str. 633. *Caffy's case*, E. P. C. 995. Hardr. 331. *Supra*, tit. *Forgery*.

(*s*) *Goodtitle v. Welford*, Doug. 139. See 1 P. Wms. 287. 1 Bl. Rep. 365. 1 Mod. 107. 3 Will. Rep. 181. 1 Barnard. 12.

(*t*) *Baylis v. Wilson*, cited 4 Burr. 2254.

(*u*) 1 Mod. 107. 1 P. Wms. 290. *Goodtitle v. Welford*, Doug. 139. *Heath v. Hall*, 4 Taunt. 328. *Phipps v. Pitcher*, 6 Taunt. 220. [2 Marsh. 20. S. C.] *Bettison v. Bromley*, 12 East, 250. [*Infra*, 786, note (1).]

(*x*) Per Ld. Ellenborough in *Bettison v. Bromley*, 12 East, 253. In that case it was held, that the wife of an executor who took no beneficial interest under the will, was a credible witness to the will under the statute. See tit. *Will*.

(*y*) *Carter v. Pearce*, 1 T. R. 163.

(1) [See American cases as to the competency of an executor, in questions relating to wills, *post*. Vol. III. p. 1690.]

(2) [In *Bean v. Jenkins*, 1 Har. & J. 135, a surety in a testamentary bond was held not to be a competent witness for the executor in a suit by him.]

sult, one way or other (z); even a creditor of the administrators, which is a stronger case, would be a competent witness (a).

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It has been seen that a creditor is a competent witness * for an administrator to prove due administration, by payment of a debt to himself (b). * 776

The heir at law is a competent witness as to the estate, for he has no present legal interest, but a remainder-man or devisee is incompetent (c). Heir at law.—

Where an informer, upon the conviction of the offender under a penal statute, is entitled to the whole, or to any part of the penalty, he is obviously interested, and therefore incompetent (d). Informer.

Where the statute gave one half of the penalty to the informer, and the first witness proved the commission of the offence, and also that no other person had given information, he was held to be incompetent (e).

An inhabitant of a county or other district, upon which any duty is thrown, to which the witness is bound to contribute, is not competent to give evidence in discharge or alleviation of the burthen. Accordingly it was held, that a party who was liable to a county-tax, for the support of the suit was incompetent (f) (1). Inhabitant. County.

By the stat. 1 Ann. c. 18, s. 13, inhabitants are competent witnesses upon indictments against individuals for the non-repair of a bridge (g).

(z) Per Buller, J. *ibid.*

(a) *Ibid.* And *vide supra*, tit. *Executor*.

(b) *Supra*, 558.

(c) *Smith v. Blackham*, 1 Salk. 283.

(d) [See *supra*, 774, note (1).] *R. v. Tilley*, 1 Str. 316. *R. v. Stone*, 2 Ld. Raym. 1545. *R. v. Piercy*, Andr. 18. *R. v. Blancy*, Andr. 240. *R. v. Cobbold*, Gilb. Cas. 111. *R. v. Shipley*, cited Gilb. Cas. 113. *Portman v. Okeden*, Say. 179.

Where it is in the discretion of the court to fine or imprison, it seems, that an informer is competent. *R. v. Cole*, 1 Esp. C. 169, [and Mr. Day's note.] *Vide tit. Penal Action*.

(e) *R. v. Blackman*, 1 Esp. C. 96. [See *R. v. Tensdale*, 3 Esp. C. 68, and Mr. Day's note.]

(f) *County of Salop v. County of Stafford*, 1 Sid. 192. 2 Lev. 231.

(g) *Supra*, 318.

(1) [Where one State sues in the courts of another, an inhabitant of such State is a competent witness for the plaintiffs. *State of Connecticut v. Bradish*, 14 Mass. Rep. 296.]

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In an action against the hundred (*h*), an inhabitant is made competent (*i*) by the stat. 8 Geo. II, c. 16, s. 15.

* So in settlement-cases, a *rated* inhabitant formerly was incompetent to give evidence for his own parish (*k*) as to the pauper's place of settlement; neither could he give evidence to extend the boundaries of his parish (*l*); so before the stat. 27 Geo. III, c. 29, a rated parishioner was incompetent to give evidence in any proceeding for a penalty given by any statute to the poor of the parish (*m*). For although in the case of *Townsend v. Row* (*n*), it was held that a parishioner was competent to support the title to an estate, where the remainder, after an estate for life, was limited to the minister and churchwardens for the use of the poor of the parish, yet this was decided upon the untenable ground that the interest was too minute to disqualify the witness (*o*). But by the statute above referred to, it is enacted, that an inhabitant of any place or parish shall be a good witness, although a penalty accrue to the poor, provided such penalty do not exceed 20*l*.

By the stat. 3 & 4 Will. & Mary, c. 11, in all actions brought, either in the Courts at Westminster, or at the Assizes, for money mis-spent by the churchwardens, the evidence of the parishioners, with the exception of those who receive alms, shall be admissible.

* 778 * And by the stat. 54 G. 3, c. 170, s. 9, it is enacted, that no person rated, or liable to be rated to any rates or cesses of any district, parish, township or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court, or person or persons whatsoever, be deemed and

(*h*) On stat. of Winton. 13 Edw. I. stat. 2. c. 1.

(*i*) He was before the statute held to be incompetent, even although he paid no taxes or parish duties, because he might be liable when the tax came to be levied. 2 Keb. 713. 1 Mod. 73. But see the cases cited below.

(*k*) *R. v. Prosser*, 4 T. R. 17. *R. v. South Lynn*, 5 T. R. 664. *R. v. Little Lumley*, 6 T. R. 157.

(*l*) *Deacon v. Cooke*, cited 2 East, 562.

(*m*) 1 Sess. cases, 874, cited Say. 180.

(*n*) 2 Sid. 109.

(*o*) But see 2 Vern. 317. See also *Jervis v. Hay*, 3 Ford, MS. 182. 10 Geo. II, where, in an action under the game-laws, a parishioner was held to be competent. There Lee, C. J. cited *Phillips v. Scallard*, 6 Geo. II. in C. B. where in a similar case a new trial was moved for; and the Court were of opinion that the witness ought to have been admitted. But see 1 Barnes, 317, where it appears that the new trial was moved for on a different ground.

taken to be by reason thereof an incompetent witness for or against such district, &c. in any matter relating to *such rates (p)* or *cesses*, or to *the boundary* between such district, &c. and any adjoining district, &c.; or to any *order of removal* to or from such district, &c.; or *the settlement* of any pauper in such district, &c.; or touching any *bastards chargeable*, or likely to become chargeable to such district, &c.; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the *election or appointment* of any officer or officers; or the *allowance of the accounts* of any officer or officers of any such district, &c.

Before this statute, a rated parishioner was incompetent in settlement-cases, but a non-rated inhabitant was competent, although he had been left out of the rate for the express purpose of making him a witness (*q*); and it was competent to him to discharge himself on the *voire dire* without producing the rate-book (*r*). But both before and after the declaratory statute 46 Geo. III. c. 37 (*r*), a rated inhabitant was considered * to be a party to the suit, and * 779 consequently he could not be examined by the adverse party without his consent (*s*). But being so far a party, it followed that his declarations were admissible in evidence (*t*), although he had not refused to be examined (*u*).

The statute 54 Geo. III. c. 170, having rendered a rated inhabitant a competent witness for his own parish, it becomes a question whether his declarations can be proved

(*p*) It has been held that a rated inhabitant is a competent witness for the defendants in an action of trespass brought against them as overseers, in respect of land claimed by them as trustees for the benefit of the parish in aid of poors rates, the pleas being the general issue, and *liberum tenementum*. For the intention of the Legislature was to make rated parishioners competent in all matters relating to rates. *Meredith v. Gilpin & others*, 6 Price, 146.

(*q*) *R. v. Kirdford*, 2 East, 559. But see *Rhodes v. Ainsworth*, 1 B. & A. 87.

(*r*) See the Act below. *R. v. Prosser*, 4 T. R. 17. *R. v. Little Lumley*, 6 T. R. 157.

(*s*) *R. v. Woburn*, 10 East, 394. *R. v. Inhabitants of Hardwick*, 11 East, 579. Note, in *R. v. Kirdford*, Ld. Kenyon distinguished the case of a non-rated inhabitant in a settlement case, from that of a hundredor, under the stat. of Hue and Cry, on the ground that the latter was a party.

(*t*) *R. v. Inhabitants of Hardwick*, 11 East, 579.

(*u*) *R. v. Whitley Lower*, 1 M. & S. 636. In *R. v. The Inhabitants of Hardwick*, the rated inhabitant refused to be examined, but the refusal does not appear to constitute a material ingredient in the case, for where in general the declaration of a party is evidence by way of admission, it is unnecessary as a preparatory step to call the party as a witness.

PART by the adverse parish, without calling him as a witness,
IV. and that question is yet *sub judice* (x).

* 780 The inhabitants of a parish are in general incompetent
Competency of witnesses to discharge the parish from the * burthen of re-
Inhabitants. pairing a highway (y); and it is said to have been held by
Ld. Kenyon, that a mere inhabitant, although he occupied
no land within the parish, was incompetent on the trial of
an issue on a plea by the inhabitants, that one Robinson
was bound to repair the road in question *ratione tenura*,
because if there should be a verdict against the defen-
dants the witness would be liable to the payment of the
fine, and also because every inhabitant is liable to do sta-
tute-duty (z).

On an issue to try whether the inhabitants of the cha-
pelry of Milne Row had immemorially repaired the chapel
at their own expense, it was held that the owner of an es-
tate within the chapelry was an incompetent witness to
negative the liability, although the tenement was then in
the hands of a tenant under a lease for years, many of which
were then unexpired, and who had been rated and paid rent
for the same, and was bound to pay the rates without de-
duction, for he had an interest in removing from the estate
a permanent burthen, which would diminish the actual va-
lue; and the case was distinguished from that of a mere

(x) Upon a question where the Court of King's Bench entertains
doubts, it would be presumptuous to obtrude a private opinion;
thus far it may be permitted to observe, that before the stat 54 Geo.
III, c. 170, such a declaration was admissible, on the ground that
the declarant was a *party to the suit*, and the effect of that statute
seems to be merely that of conferring competency, notwithstanding
interest, without further interfering with the rules of evidence on
the particular subject. And it seems to be going a great length to
contend, that, because a party may be a witness in his own cause,
notwithstanding his interest, that therefore the adversary shall be
deprived of the benefit of his declarations. The main argument
which was urged against the reception of the evidence, viz. that it
was not the best evidence, appears to be a very fallacious one, for
the whole doctrine of receiving admissions of parties in evidence is
built on the ground that such admissions and declarations are bet-
ter evidence of the truth than the testimony of the party himself
examined upon oath. The case most analogous to the present is
that of a plaintiff in an action against the hundred, on the Stat. of
Winton; he is a competent witness notwithstanding his interest,
and yet his declaration would surely be admissible in evidence for
the hundred.

(y) 4 Mod. 48, 49, & *supra*.

(z) *R. v. Inhabitants of Wheaton Aston*, Cor. Ld. Kenyon, Staf-
ford Summer Ass. 1797, cited as from the MSS. of Serj. Williams,
in Chetwynd's Burn's J. tit. *Evidence*, 792. S. C. not S. P. 2 Saund.
159 (a).

occupier who has no permanent interest (a). But in all these cases the mere inhabitancy of the party is not sufficient to disqualify him, unless he would be individually liable to a portion of the burthen. Accordingly in a settlement-case * it was held, that the mere liability of the witness to be rated to the relief of the poor did not render him incompetent (b), although the name of the witness was omitted out of the rate for the express purpose of using his testimony (c). And so it was held where the penalty upon an information was directed to be given to the poor of the parish (d). So the court refused to quash a conviction in a similar case, although it appeared to have been obtained on the oath of an inhabitant, because it did not appear that he was rated (e) (1).

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Inhabitants.
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Joint Interest :—A party to the transaction out of which the action arises, and possessing a community of interest in the subject-matter, is nevertheless competent, unless he be either a partner, or be immediately responsible over for

Joint interest
in the subject-
matter.

(a) *Rhodes v. Ainsworth*, 1 B. & A. 17. 2 Starkie's C. 215.

(b) *R. v. Prosser*, 4 T. R. 17. *R. v. South Lynn*, 5 T. R. 664.

(c) See *R. v. Inhabitants of Kirdford*, 2 East, 559, and the case cited by Buller, J. 4 T. R. 20.

(d) 4 T. R. 20. 2 East, 559.

(e) [See 1 Chip. Rep. 431.] 1 Sess. Cas. 874, cited Say. 180. A parishioner paying rates is a competent witness in an action defended under an order of vestry, which directs the expenses to be paid out of the rates, he having signified, on being informed that the application could not legally be made, that he would not personally contribute. *Yates v. Lance*, 6 Esp. C. 132.

(1) Inhabitants of towns, parishes, &c. in Massachusetts are, by st. 1792, c. 32, made competent witnesses in suits at law wherein the towns, &c. are a party or interested : And so, by st. 1821, c. 99, are members of school districts. Inhabitants of counties have always been admitted without question.

In Connecticut, New Hampshire, New York and New Jersey, the courts seem to have adopted a general rule, that where corporations, or quasi corporations, which comprehend the divisions of the State, such as counties, towns, parishes, &c. are parties, or interested in the suit, the members of such bodies are competent witnesses. *Cornwell v. Isham*, 1 Day, 35. *Swift's Ev.* 57.—*Eustis v. Parker*, 1 N. Hamp. Rep. 273. *Canning & ux. v. Pinkham & al.* *ibid.* 353.—*Falls & al. v. Belknap*, 1 Johns. 486. *Bloodgood v. Overseers of Jamaica*, 12 *ib.* 285.—*Schenck v. Corshen*, 1 Coxe's Rep. 189. *Burlington v. Fennimore*, *ibid.* 190. *Orange v. Springfield*, 1 Southard's Rep. 186. *Semb.* that this was also the law of Vermont, even before the st. of Nov. 1816, which makes inhabitants of counties, towns, &c. competent. *Pond v. Sage*, 1 Chip. 250. *Town of Arlington v. Hinds*, *ibid.* 431.]

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the whole or part of the damages in case the plaintiff recover, or unless he be interested in the record (2).

- Formerly the distinction between an interest in a particular *fact*, or question abstractedly, and an interest in the *event* of the particular cause then pending, was not sufficiently attended to; witnesses who were interested in the transaction, or question abstractedly, but who had no interest in the immediate event of the action, were held to be incompetent. Thus it was held, that the master of a vessel, who had insured goods on board, was not competent for the plaintiff in an action by the owner of other goods on a policy effected on them (*f*); that is, he was held to be incompetent as * a witness for the plaintiff, because he had an interest in the question, whether an insurance on goods could under the circumstances be enforced, although he had no interest in the particular goods insured in that action, and although the result of that action would be in point of law perfectly irrelevant in proceeding to recover on his own insurance. Such a decision would no longer be supported, the proper test of competency being the interest which the witness has in the immediate event of the particular suit, or in the record, for the purposes of evidence (*h*), and any collateral or incidental connection of the witness with the transaction, although it may tend to influence or prejudice his mind, is immaterial. Consequently a co-underwriter is a competent witness for the defendant in an action upon the policy (*i*). So one mariner may prove wages due to another for the same voyage, in respect of which he himself has a claim (*k*) (1).

A joint purchaser of an annuity as tenant in common with the plaintiff, is competent in an action against a con-

(*f*) *Rock v. Layton*, Fort. 246. And see *Skinner*, 174, where, in an action brought by a master of a ship against custom-house officers for refusing to clear the ship, it was held that the owner of goods on board was not competent.

(*h*) *Bent v. Baker*, 3 T. R. 27. *Ridout v. Johnson*, B. N. P. 283.

(*i*) Ibid. [See *Wallace v. Child & al.* 1 Dallas, 7.]

(*k*) *Skinner*, 174.

(2) In a penal action against a member of the society called Shakers, another member is a competent witness, although they hold all things in common, and have a partnership interest in all their concerns, as a religious society. *Wells v. Lane*, 8 Johns. 462.]

(1) [One seaman may, by the maritime, as well as the common law, be a witness for another in any suit respecting the same voyage, although interested in the question, if he be not interested in the event of the suit. *Spurr & al. v. Pearson*, 1 Mason's Rep. 104. There are, however, some contrary decisions in Peters' Admiralty Decisions. See also *Hoyt v. Wildfire*, 3 Johns. 518. *Powell v. The Betsey*, 2 Browne's Rep. 350.]

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veyancer for negligence and fraud in the negotiation of the annuity (l). So it seems to be clear, that any person who has received any distinct injury from the act of the defendant complained of in the action, is a competent witness to prove the plaintiff's case, since the recovery by the plaintiff would not tend to establish his own case.

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So one who has purchased a share in the plaintiff's work, which he is printing, is competent to prove a contract by the defendant, to insure it from fire (m).

* One of three joint obligors is competent to prove the execution of the bond, although he is interested in increasing the number of obligors, who are liable to contribute to the payment, since the recovery by the plaintiff would not be evidence to show his obligation (n) (1). * 783

So it has been seen, that a co-contractor is a competent witness for the plaintiff, even on issue taken on a plea in abatement, that the witness ought to have been joined as a co-defendant (o). It is to be observed that in the case above referred to the witness denied that he was a partner (p) at all, and therefore the question was not pre-

(l) *Robey v. Howard*, 2 Starkie's C. 555.

(m) *awoman v. Gillett*, 2 Taunt. 325. *Lloyd v. Archbottle*, ib. 324.

(n) *Lockhart v. Graham*, 1 Str. 35; but see *Brown v. Brown*, 4 Taunt. 752. See tit. *Partners*. A supercargo, who was to have had a share in the profits of an adventure, is a competent witness for the owner against the underwriter, to recover the invoice price of the goods, no insurance having been made on the profits. *Robertson v. French*, 4 Esp. C. 246; see also *Garthwaithe v. Duckworth*, 12 East, 421; *Barton v. Hanson*, 2 Taunt. 407.

A joint maker of a promissory note is competent to prove the signature of the other maker. *York v. Blott*, 5 M. & S. 71. See tit. *Parties*.

In debt against the heir on a joint obligation by the executors and J. S., by which they bound themselves jointly and severally, J. S. is a competent witness to prove the execution of the bond. Vin. Ab. Ev. I. 20, Tr. *per pais*, 334.

But one of two parties who has let judgment go by default is not, it seems, a competent witness for the plaintiff. *Brown v. Brown*, 4 Taunt. 753. Even although he has been released by the plaintiff. *Mant v. Mainwaring*, 2 Moore, 9.

(o) *Supra*, 5. And *Robinson v. Hudson*, 4 M. & S. 475.

(p) Ib. see also *Birt v. Hood*, 1 Esp. C. 20, where, in an action for goods sold and delivered, and the general issue pleaded, a witness was admitted to prove that the credit was given to her alone, and she was admitted by Eyre, C. J. to prove this, notwithstanding a suggestion by the plaintiff, that the defendant and witness were partners.

(1) [The principal obligor in a bond is not a competent witness for the surety in an action against him on the bond—being liable to him for costs, if the judgment should be against him. *Riddle v. Moss*, 7 Cranch, 206.]

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cisely upon the point whether a co-partner not joined is a competent witness for the plaintiff, but the arguments and observations of the Court go to that extent, for it was considered that he would be competent, even assuming him to be a partner, since in that case he would be ultimately liable for one moiety of the plaintiff's demand, and no further. But where the witness being a co-partner, would be liable, not only to a moiety of the debt, but also of the costs, in case the plaintiff recovered, he is incompetent to defeat the action (q).

- * 784 In an action of covenant against Backhouse, the part-owner of a ship, jointly with Foulston, to reimburse * the ship's husband for sums paid for insurance, the plaintiff having brought a similar action against Foulstone, the plaintiff adduced evidence to show that Foulstone ordered the insurance, and that the defendant approved of it; the Court held that Foulstone was incompetent to prove that the defendant never knew of the insurance, because on the plaintiff recovering against the defendant, Foulstone would be liable for half the sum recovered (r). The ground of decision there was, that had the plaintiff recovered, the witness would have been liable to half the damages. This, however, would not, it seems, have been the consequence; in the subsequent case of *Walton v. Shelley* (s), it was observed by Mr. Justice Buller, that the witness in the event

(q) 4 M. & S. 475. And see *Young v. Bairner*, 1 Esp. C. 103, where, in an action against a part-owner of a ship, for work done to the ship, and issue taken on a replication to a plea in abatement, that the defendant had undertaken *solely* to pay, Ld. Kenyon held that Whytock, a joint-owner, was not a competent witness to prove that he gave the order, because he would be liable in contribution to the defendant in case the plaintiff recovered. As a partner, however, it seems that he stood indifferent, since, according to the principle laid down in *Hudson v. Robinson*, 4 M. & S. he would ultimately be liable to his own share only. The question seems to have been whether he would not by his testimony get rid of a share of the costs. The Court of K. B. held that he was at all events rendered competent by a release.

In *Goodacre v. Breame*, Peake's C. 174, the plaintiff having proved the sale of the goods to the defendant, and to J. S. his partner in trade, Ld. Kenyon held that J. S. was not competent to defeat the action, by evidence that the goods were sold to himself, and that the defendant was merely his servant, since he would by his evidence discharge himself from a moiety of the costs. See also *Baker v. Tyrrell*, 4 Camp. 27, and tit. *Partners*, and *Vendor and Vendee*. [See *Gardiner & al. v. Levaud*, 2 Yeates, 185. *Purviance v. Dryden*, 3 Serg. & Rawle, 407. *Hopkins v. Smith*, 11 Johns. 161. *Willing & al. v. Consequa*, 1 Peters' Rep. 301. *The State v. Penman*, 2 Desauss. 1. *Kile v. Graham*, 1 M'Cord, 552.]

(r) *French v. Backhouse*, 5 Burr. 2727.

(s) 1 T. R. 296. 303.

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of a recovery by the plaintiff would have been liable to no part of the damages. But, wherever the witness has a joint interest with the plaintiff in the subject-matter to be recovered, or would be responsible to the defendant * for the damages recovered, he is no longer competent. Accordingly, upon an information in the Exchequer, upon a seizure of goods by a custom-house officer, it was held that another officer was not competent, because he had made an agreement with the former that they should share in all seizures, although he conceived that the agreement was illegal, and did not expect any benefit from the seizure in question (q). So it has been seen, that those who have a joint interest in the subject-matter of the suit, such as commoners, in a question as to a right of common (r), or corporators, who possess any private interest in the event, are incompetent (s).

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matter.

As to the interest of *landlords and tenants*, see tit. *Ejectment* (t).

A legatee is not a competent witness to support a will (v); nor is he a competent witness for the executor to increase the estate, for the judgment would afterwards be evidence against him (u) (1). With respect to the competency of a

Legatee.

(q) *R. v. Walker*, 1 Ford, MS. 145.

(r) *Supra*, 391.

(s) *Supra*, 426.

(t) A tenant is a competent witness for the plaintiff in an action by a reversioner, for an injury to the inheritance. *Doddington v. Hudson*, 2 B. & B. 257.

In an action by a lessor against a lessee, for not cultivating land according to his covenant, a sub-lessee is competent to prove performance. *Wishaw v. Barnes*, 1 Camp. 341.

(v) Hardr. 331. 2 Salk. 691.

(u) See 2 Starkie's C. 546. A residuary legatee is not a competent witness for the executor, although he has released the debt, for he is still liable for the costs of the action. *Baker v. Tyrohitt*, 4 Camp, 27.

(1) [That a residuary legatee cannot be a witness for the executor, see *Austin v. Bradley*, 2 Day, 466.

But a residuary legatee, who by the will was to receive a certain proportion of the value of land devised to A., in case of a sale thereof by A. to any person except B.—was held to be a competent witness for A. in an action between him and a person claiming paramount to the devise. *Galbraith's Lessee v. Scott*, 2 Dallas, 95. So one to whom a legacy had been bequeathed, payable out of real estate, was held to be competent to prove that a deed of land, made by the deviser, had been fraudulently obtained—the will being predicated on the supposition that the deed was valid. *Shultz v. Hahn*, 4 Yeates, 299.

A specific legatee, it seems, is not a competent witness to disprove

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legatee, as an attesting witness to a will, see tit. *Will*.

Parties (x).—Partners,—Policy of Insurance. See those titles.

Party.
Prochein ami.

Prochein ami.—A father or guardian who supports the expense of an action by his infant son, for an assault, is not competent, because he is liable to costs (*y*); and for the same reason, any other who sues as *prochein ami* is incompetent (*z*) (2).

* 786 ** Prosecutor.—Supra*, p. 770.

Sheriff.—See tit. *Sheriff*.

Surety.

Surety.—Where a surety would be immediately liable in case of a decision against the principal, his interest is obvious, and therefore a bail is incompetent in an action against his principal (*a*). So where *A.* gave a bond to in-

(*x*) Their competency will be separately considered, since it depends upon other considerations besides that of interest.

(*y*) *Hopkins v. Neal*, Rep. Temp. Hardw. 202. 2 Str. 1026. *James v. Hatfield*, 1 Str. 548. 1 Cox's Cases in Chan. 286.

(*z*) Ibid. *Clutterbuck v. Lord Huntingtower*, 1 Str. 506.

(*a*) See *Goss v. Tracy*, P. Wms. 288. *Supra*, tit. *Bail*.

the claim of a creditor against the testator's estate. *Temple's Ex'or. v. Ellett's Ex'x.*, 2 Munf. 452. In this case, however, it was not shown that the residuary estate was sufficient to pay the debts of the testator—nor that the executor had assented to the legacy and delivered it to the legatee—which circumstances, Mr. Munford supposes, might have varied the case. See Munford's Digest, 283. But in *Hedges v. Boyle*, 2 Halsted's Rep. 68, legatees of specific moveable property, and devisees having a contingent remainder in a part of the real estate under a will containing a clause "that in case the estate should not be sufficient to pay their legacies, they should receive only a proportionate part," were held by the Sup. Court of New Jersey to be incompetent witnesses for the executor in a suit against him for a debt of the testator, although the executor had paid the specific legacy, and given them a release. In the case of *Leary v. Littlejohn*, 1 Murphey, 406, the Sup. Court of North Carolina held that a specific legatee, not entitled to any share of the residuum, was a competent witness in a suit by the executor for goods sold and delivered by the testator, unless there was a reasonable probability that the specific legacy must be resorted to for the payment of debts; without this probability, they held his interest to be too remote to affect his competency.]

(2) [*Semb.* that a guardian *ad litem* is a competent witness. *Lupton v. Lupton*, 2 Johns. Ch. Rep. 626.

The *prochein ami* of an infant plaintiff may be changed, and being thereby released from responsibility for costs, may be a witness for the infant. *Burks v. Shain*, 2 Bibb, 341. One whose name is used, without his consent or knowledge, as *prochein ami* of an infant, is not thereby disqualified from being a witness. *Burwell v. Corbin*, 1 Randolph, 131.]

demnify *B.*, a candidate, against the expenses of an election, to a certain extent, and *C.* brought an action against *D.* for money expended at the election on *B.*'s account, it was held that *A.* was not competent to defeat the action, by showing that the defendant was an agent only; since, if the defence failed, the defendant would recover against the candidate, and the candidate against *A.*; and it was held to be no answer, that in case the defendant succeeded the witness would still be liable to the candidate, because in that event he would be liable for a portion of the bill only, and not for the costs of the action (*b*): but the co-obligor of a bond to the ordinary, under the stat. 22 & 23 Ch. 2, is competent to prove a tender by the administrator, because there is but a bare possibility that an action will be brought against the witness, and therefore the case of the witness differs from that of bail, who are directly and immediately interested (*c*).

Trustee.—A mere trustee is competent without a release, and it is no objection that he may be sued as an executor *de son tort* (*d*) (1). Trustee.

Vendor and Vendee.—The vendor of an estate has no interest in the title of the vendee, unless he covenanted for or warranted the title (*e*). Vendor.

(*b*) *Trelawney v. Thomas*, 1 H. B. 303.

(*c*) *Carter v. Pearce*, 1 T. R. 163. [See *supra*, 775, note (1).]

(*d*) *Holt v. Tyrrell*, 1 Barnard. 12. *Goodtitle v. Welford*, Doug. 139. 4 Burr. 2254. 1 P. Wms. 287. A trustee in whom a power is vested to nominate to an endowed school, is competent to support his own nominee. *Withnell v. Gartham*, 1 Esp. C. 322. An assignee of a bankrupt who has released his individual claim on the bankrupt's estate, is competent to prove the petitioning creditor's debt, in an action by a judgment-creditor of the bankrupt, against the sheriff for a false return. *Tomlinson v. Wilkes*, 2 B. & B. 397. So an executor, though he has duties to perform, is an admissible witness. *Phipps v. Pitcher*, 6 Taunt. 220; *Goodtitle v. Welford*, Doug. 139; and see *Lowe v. Jolliffe*, 1 Bl. Rep. 365.

(*e*) *Busby v. Greenslate*, 1 Str. 445. See tit. *Vendor and Vendee*.

(1) [The practice of the English court of chancery to admit a trustee as a witness has been uniformly adopted in the courts of law of Pennsylvania. *Drum v. Lessee of Simpson*, 6 Binney, 481. And a trustee is competent to give evidence of misrepresentations made to him, in consequence of which he accepted the trust. *ibid*. A mere naked trustee is a competent witness in a controversy in which a creditor attempts to set aside the deed on the ground of fraud. *Harvey v. Alexander*, 1 Randolph, 219. Where a trustee has a legal interest in the estate, but it is in all other respects nominal, he cannot be examined at law, as to the merits or design of the deed, but may be in equity. *Hawkins v. Hawkins*, 2 Car. Law Repos. 267.

See *Post*. Vol. III. 1690, 1701, and notes.]

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JUSTICES.

IN actions against justices of the peace and peace officers (f) may be considered—

I. *The Proofs in an action against a justice of the peace, &c.*

1. Of notice of action, p. 792.
2. Of the commencement of the action, p. 796.
3. Of the cause of action, within the county, &c., p. 798.
4. Where a conviction has been quashed, p. 799.

II. *Proofs in defence by justices*, p. 800.

III. *By constables, &c. acting under a warrant*, p. 810.

IV. *By constables, &c. acting without warrant*, p. 819.

Proof of notice of action.

1. *Notice of action.*—By the stat. 24 Geo. II, c. 44, s. 1, no writ shall be sued out against, nor any copy of any process at the suit of a subject, shall be served on any justice of the peace for any thing by him *done in the execution of his office (g)*, until notice in writing of such intended writ or process (h) shall have been *delivered (i)* to him, or left at the usual place of his abode by the *attorney (k)* or agent for the party who intends to sue, or cause the same to be sued out or served, at least *one calendar month (l)* before the suing out or serving the same; in which notice shall be clearly and explicitly contained the *cause of action (m)* which such party hath or claimeth to have against such justice of the peace; on the back of * 793 * which notice, shall be *indorsed the name of such attorney (n)* or agent, together with the *place of his abode (1)*.

(f) For actions against officers of Excise, &c. see the title.

(g) *Infra*, 793.

(h) *Infra*, 794.

(i) *Infra*, 794.

(k) *Infra*, 794.

(l) *Infra*, 796.

(m) *Infra*, 796.

(n) *Infra*, 795.

Swan, 12 East, 419—Mr. Howe's note to *De Bernales v. Wood*, 3 Camp. 258—Mr. Hening's appendix to his late valuable edition of Francis's Maxims of Equity—in which he makes very respectful reference, on this subject, to Tate's Digest of the Laws of Virginia; titles, *Interest—Executors & Administrators.*]

(1) [It is held that a similar statute in Pennsylvania, passed March 21st, 1772, should be liberally construed, for the protection of justices. *Mitchell v. Cowgill*, 4 Binney, 24. And a justice who becomes liable to the penalty imposed by statute for marrying a minor, without consent of parent or guardian, is entitled to notice. *Ibid.* So in an action *before a justice*, to recover the penalty imposed by statute for taking illegal fees, notice is necessary. *Prior v. Craig*, 5 Serg. & Rawle, 44.]

Done in the execution of his office.—The object of the Legislature was to enable the magistrate to tender amends for the *wrong* done; the statute therefore supposes a wrong to have been done in consequence of some excess, or want of authority, for where the justice has not exceeded his authority the enactment is useless. Hence, if the subject-matter be within the *jurisdiction* of the magistrate, and he intend to act as a magistrate at the time, he is within the protection of this statute, although he acts erroneously (o). The statute applies, unless the act be wholly *aliene* to the jurisdiction, and done *diverso intuitu* (p). Proof of notice, when necessary.

And where the subject-matter is within the jurisdiction of the magistrate, it will be presumed that he acted as a justice (q); and therefore, where one who was lord of a manor, and also a justice of the peace, seized a gun in the house of an unqualified person, it was presumed that he acted as a justice, and notice was held to be necessary (r).

* Where an action was brought to recover a penalty for acting as a magistrate without a qualification (s), it was held that the defendant was not entitled to notice, the question being whether he *was* a magistrate at all (t). * 794

(o) See *Weller v. Toke*, 9 East, 364. A constable is protected in those cases only where he acts in obedience to the warrant, but a magistrate in all cases where he acts by virtue of his office. *Money v. Leach*, 3 Burr. 1742; *Prestidge v. Woodman*, 1 B. & C. 12. Where the magistrate had jurisdiction over the offence, he was held to be protected, although the place where the offence was committed was beyond the limits of his jurisdiction. *Prestidge v. Woodman*, 1 B. & C. 12; see *Gaby v. The Wilts. and Berks. Canal Co.*; 3 M. & S. 580.

(p) Per *Ld. Ellenborough*, 9 East, 365, & *P. C. Briggs v. Evelyn*, 2 H. B. 115. And therefore, if a single magistrate commit the mother of a bastard for not filiating a child, although jurisdiction by the stat. 18 Eliz. c. 3, s. 2, is given to two magistrates, acting jointly, and not to a single one, he is within the protection of the statute. *Weller v. Toke*, 9 East, 364. [*S. P. Jones v. Hughes*, 5 Serg. & Rawle, 302.] So where by a local act of Parliament notice was required of any action for any thing done in *pursuance* of the act, it was held that a magistrate was entitled to notice who had acted under colour of the act, although he had exceeded his jurisdiction. *Graves v. Arnold*, 3 Camp. 242. And see *Stiles v. Cox*, Vaugh, 111. [See also *S. P. Butler v. Potter*, 17 Johns. 145. *Jones v. Hughes*, 5 Serg. & Rawle, 301.]

(q) 2 H. B. 114.

(r) *Briggs v. Evelyn*, 2 H. B. 114. The stat. 5 Ann. c. 14, empowers a justice to seize an engine for the destruction of game in the hands of an unqualified person.

(s) Under the stat. 18 Geo. II, c. 20.

(t) Per *Wood, B. Wright v. Horton*, 1 Holt's C. 438.

PART nor upon a policy of insurance (b); nor upon an agree-
IV. ment for retaining tithes, no day having been fixed for the
 ————— payment (c).

* 790 * Notwithstanding the above general rules, it seems in
 * 791 principle (d), that if by the *tort* of the defendant, * or his

for allowing interest was extended to all liquidated sums, although the balance there arose on an account stated for goods sold and delivered. And in *Penhorn v. Tuckington*, 3 Camp. 468, *Ld. Ellenborough* held that where money due on a balance of account was awarded to be paid on a particular time and place, interest ran after a demand duly made. See also *Marquis of Anglesea v. Chafey*, per *Abbott*, J. *Dorchester Spring Ass.* 1818. *Manning's Index*, 185. And see 1 *East*, 400. 1 *M. & S.* 173. *Vin. Ab. tit. Arbitration*, C. 2.

(b) *Kingston v. Mackintosh*, 1 Camp. 518. And per *Le Blanc*, J. in *De Bernales v. Fuller*, 2 Camp. 427. And per *Ld. Ellenborough*, in *De Havilland v. Bowerbank*, 1 Camp. 50.

(c) *Shipley v. Hammond*, 5 *Esp. C.* 114; but it was said that it would have been otherwise had a day been appointed for payment.

(d) The above general rules which have been laid down on the subject of interest, are professedly founded upon considerations of practical convenience and usage, rather than upon any settled and general principle. Hence, as might be expected, the decisions upon this subject exhibit great inconsistency, notwithstanding the efforts made by the Courts to reconcile them. The making the title to interest depend upon a contract, express or implied, has been productive of considerable difficulty, for, upon principle, the right to interest does not properly originate immediately in contract, but is rather a consequence of a *tort*, or breach of another contract, which creates a right to compensation for the loss of interest, as in the case of any other consequential damage.

In this view of the subject, arguments derived from practice and usage can have little weight; for although such considerations may tend strongly to show what the intention and understanding of the parties was in a matter of contract, yet a custom or understanding that a plaintiff shall not recover damages for a loss which he has sustained from the wrongful act of another, will not stand the test of legal criticism.

One who sells an estate, or large quantity of goods, bargains to be paid on a particular day, because he knows that he has contracted to make payments on that day; the vendee refuses to pay him on that day *per quod* the vendor is obliged to borrow money to pay his own debts, and pay interest for the money so borrowed; is not a party so circumstanced entitled to damages for the special loss, occasioned by a wilful violation of a promise made upon a good consideration? Is it any answer to say that he did not contract for interest or for payment in a negotiable security on that day? He did not contract for interest, or for a security, because a suspension of payment in consequence of it would have defeated his intention; he contracted according to his exigencies for actual payment. With respect to the practice of the Courts, on which great stress has been laid, there are cases directly to the contrary. See *Blaney v. Hendrick*, 3 *Wils.* 205. 2 *Bl. Rep.* 761; *et supra*, 788, 9.

But if in point of law a party so situated would be entitled to

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breach of contract, the plaintiff has been deprived of the use of his money, he may, if he allege the loss specially, recover the amount in damages. In an action (e) on an agreement for the sale of an estate, to recover the deposit, the plaintiff declared specially, and alleged, by way of special damage, that by reason that a good title could not be made, he had lost and been deprived of the benefit of the money deposited; and Lord Ellenborough held, that the plaintiff was entitled to recover interest as special damage; he had averred, that by the defendant's breach of contract he * had lost the use of his money, and having proved the averment, there was no reason why the loss should not be compensated (1). In actions of tort. * 792

recover, the question arises whether he must declare specially, alleging the damage resulting from the breach of contract.

The first point seems to be, whether the loss of interest is not a damage for which the defendant ought to make compensation. If A. wrongfully intercepts the money of B., or, in violation of an agreement, refuses to pay over money to him on a particular day, which he had promised on a good consideration to do, although there is no contract for interest in either case, yet there is a damage; and as this damage necessarily results from the defendant's wrong, the plaintiff, in natural justice, as well as upon the plainest principles of law, is entitled to recover a compensation in damages. If he were to declare specially, the conclusion that he would be entitled to recover seems in principle to be inevitable; and if in such a case he could not, for technical reasons, recover on the common counts, the same formal objection would equally apply where the plaintiff is entitled to recover interest in respect of an *express or implied agreement*.

There seems to be no impropriety in allowing the plaintiff to recover such damages under the general breach and allegation of damage in *indebitatus assumpsit*. The refusal to pay the money is alleged to be the damage of the plaintiff, and the amount of the interest is but the natural and legal measure of that damage. See *Trelawney v. Thomas*, 1 H. B. 303, and the other cases above cited.

In the case of *Marshal v. Poole*, 13 East, 98, the Court answered the formal objection by saying, that the interest, subsequent to the day appointed for payment, might be considered as *part of the price* of the goods; upon the same principle, on an agreement to repay money on a day certain, the interest may be considered to be part of the price, or remuneration for the loan; see, however, *Walker v. Constable*, 1 B. & P. 306, where the Court, on the authority of *Moses v. Macfarlane*, 2 Burr. 1005, were of opinion, that in an action for money had and received no more than the net sum, without interest, could be recovered; and see *Tappenden v. Randall*, 2 B. & P. 472.

(e) *De Bernales v. Wood*, 3 Camp. 258.

(1) [On the subject of *Interest*, which seems hardly to relate to the doctrine of *Evidence*, see cases, English and American, collected and arranged in Mr. Day's notes to *Atkins & al. v. Wheeler & al.*, 2 N. R. 205; *Shipley v. Hammond*, 5 Esp. C. 114; and *Gordon v.*

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IV.Time of the
notice.Commence-
ment of the
action.

At least one calendar month before the suing out or serving the same.—For this purpose, and also to show that the action was commenced within six calendar months, the plaintiff must prove the commencement of the action (*h*); the day on which notice is served is to be included (*i*).

2. *The commencement of the action within six months.* By sec. 8, of the same stat. no action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or person acting as aforesaid (*j*), unless commenced within six calendar months after the act committed. This must be proved as usual by the production of the writ, or an examined copy of the return (*k*).

The suing out the common process of a bill of Middlesex, *latitat*, or *capias quare clausum fregit*, is considered the commencement of the action (*l*). But the true time of suing out the writ may be proved in opposition to the *teste*, as where it is sued out in vacation, and bears date as of the preceding term (*m*). The * memorandum upon the record, where the proceeding is by bill, may also show the commencement of the action within time (*n*).

(*h*) *Supra*, 657. 679; and see tit. *Time*.

(*i*) *Castle v. Burditt*, 3 T. R. 623. See tit. *Hundred*, and *Time*.

(*j*) *Infra*, 819. *Smith v. Wiltshire*, 2 B. & R. 619; *Infra*, 816.

(*k*) *Supra*, 637. *Hundred.—Time*.

(*l*) Willes, 257; 2 Bl. Rep. 925; 2 Burr. 964. So a *latitat* is a good commencement of a penal action. *Bridges q. t. v. Knapton*, *ibid.* notwithstanding doubts to the contrary. *Culliford v. Blandford*, 4 Mod. 129.

(*m*) *Johnson v. Smith*, 2 Burr. 960. . .

(*n*) See tit. *Time*, and *supra*, 637, and tit. *Hundred*. Although the commencement of an action cannot be legally proved except by the production of the writ, &c. (per Le Blanc, J. in *Mathews v. Haigh*, 4 Esp. C. 100;) yet as *against a plaintiff*, proof of the delivery of a declaration by him, at a particular time, will be evidence that the action existed at that time. (*Mathews v. Haigh*, 4 Esp. C. 100, per Le Blanc, J.; and *Harris v. Orme*, 2 Camp. 497, in the note.) But *semble*, this would not be sufficient evidence in an action against a magistrate, for the delivery of a declaration is the plaintiff's own act and although it might operate as an admission against himself, would scarcely be binding on a defendant; but see 2 Philipps, 246.

the back of it, that he resided at W—and it was held not to be sufficient. *Slocum v. Perkins*, 3 Serg. & Rawle, 295. A notice directed to the defendant, and signed by the plaintiff, and indorsed thus—“Notice to J. S. Esq. *Henry Read*, living in Poplar lane, between 3d & 4th Streets”—was held to be defective, in not stating that *Read* was the plaintiff's agent, and in not containing any thing from which it might be inferred that he was his agent with authority to receive a tender of amends. *Lake v. Shaw*, *ubi sup.*]

The plaintiff must not only show that he sued out a writ within the time, but also that he proceeded upon that writ.

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In *Weston v. Fournier* the notice of action was served on the 10th of March 1809, a writ of *latitat* was sued on the 20th of May following, an *alias* writ was sued out February 6th 1810, and the memorandum of the record was of Hilary 1810. It was objected, that the first writ had not been served, and that as it had not been returned, the *alias* writ, which was after the memorandum on the record, could not be connected with it in continuance; and the Court held that the plaintiff had been properly nonsuited upon this objection (*o*); for there was no service of the first writ, and it was not returned (*p*).

Commence-
ment of action.

Where several writs are sued out, it is necessary to * show that the first has been returned (*q*); but where one * 798 only has been sued out it is sufficient to prove it without proving the return, provided the plaintiff has declared within a year afterwards (*r*).

3. Where the cause of action is a continuing one, by imprisonment, it is sufficient to show that the action was commenced within six months of the end of such imprisonment (*s*). But if the plaintiff gives notice pending the imprisonment, he is bound to proceed within six months of the notice, for as to any subsequent cause of action there is no notice (*t*).

Cause of
action.

The cause of action must be proved to have arisen within the county (*u*). The trespass, or other cause of action,

(*o*) 14 East, 491. Note, the imprisonment continued till July; but it was held that the plaintiff was bound to proceed within six months after notice; *vide infra*, 798. See *Harris v. Woolford*, 6 T. R. 617;—and *Stanway v. Perry*, 2 B. & P. 157; and tit. *Time & Limitations*.

(*p*) Bayley, J. observed, that the suing out of the second writ was at least *prima facie* evidence, to show that the *first* had not been served. 14 East, 493.

(*q*) *Parsons v. King*, 7 T. R. 6. *Harris v. Woolford*, 6 T. R. 617. *Stanway v. Perry*, 2 B. & P. 157. *Smith v. Bower*, 3 T. R. 662. See tit. *Limitations*.—*Time*.

(*r*) *Parsons v. King*, 7 T. R. 6.

(*s*) *Massey v. Johnson*, 12 East, 67. *Pickersgill v. Palmer*, B. N. P. 24; for the whole is one entire trespass.

(*t*) *Weston v. Fournier*, 14 East, 491. Trespass or trover for seizing goods must be brought within the time limited from the original seizure. *Godin v. Ferris*, 2 H. B. 14; *Saunders v. Saunders*, 2 East, 254; *P. C. Smith v. Wiltshire*; 2 B. & B. 662. So in the case of a custom-house officer, even although a suit for condemnation be pending in the Exchequer. *Godin v. Ferris*, 2 H. B. 14.

(*u*) 21 Jac. I, c. 12, s. 5.

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is to be established By proving the authority of the magistrate given to the bailiff or constable, either by evidence of an oral or written direction ; by the production and proof of the warrant, if it be in the plaintiff's power, or if not, by serving the person in possession of it with a *subpoena duces tecum*, to produce it, or giving notice to the defendant to produce it, and by giving parol evidence of it after proof that it is in his possession, and his omission to produce it.

In actions against a constable who has acted in obedience to the warrant of a magistrate, if his neglect or refusal to produce the warrant, and grant a copy of it, be relied upon, the plaintiff must prove a demand of the warrant (x).

* 799
In case of
conviction
quashed.

* By the Stat. 43 Geo. III. c. 141, in all actions brought against any justice of the peace on account of any conviction made by virtue of any act of Parliament, or by reason of any thing done or commanded to be done by such justice for the levying of any penalty, apprehending any party, or for or about the carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff in such action, besides the value and amount of the penalty, which may have been levied upon the plaintiff in case any levy thereof shall have been made, shall not be entitled to recover any greater damages than the sum of two-pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action (which shall be in an action upon the case only), that such acts were done *maliciously*, and without any *reasonable or probable cause*.

This statute applies to those cases only where a conviction has been quashed (y). To entitle himself to greater damages than two-pence, the plaintiff must *prove* that the act of the magistrate was malicious, and without reasonable or probable cause. The question in such a case is not whether there was reasonable or probable cause *in fact*, but whether it *appeared to the magistrate* that there was such

(x) *Vid. infra*, 810, 11.

(y) *Massey v. Johnson*, 12 East, 67 ; where, in an action of *trespass* it appeared to be doubtful whether there had been a conviction or not, the Court would not, on motion to set aside the nonsuit of the plaintiff (on the ground that the action ought to have been laid in case), listen to an affidavit that there had, in fact, been a conviction, but granted a new trial. See also *Gray v. Cookson*, 16 East, 15. After the conviction has been quashed the action must be in case, and not in trespass ; but the general rule (which still governs cases which are not within the statute) is, that an action for a commitment under a warrant must be in trespass, and not in case. *Morgan v. Hughes*, 2 T. R. 225.

cause, for it does not follow that he acted maliciously, although there was no reasonable or probable cause in fact. For this purpose, *what passed before the magistrate relating to the conviction is proper and necessary evidence (z). PART
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* 800

II. By the st. 21 Jac. I. c. 12, s. 5, if any action shall be brought against any justice of the peace, mayor or bailiff of a city or town corporate, headborough, portreeve, constable, tithing-man, churchwarden, or overseer of the poor, and their deputies, or any other who by their aid, or by their commandment, shall do any thing concerning their office, concerning any thing by them done by virtue of their office, such action must be laid within the county where the trespass was committed. The defendant may plead the general issue, and give the special matter in evidence (a). Proofs by
justices in
defence.

It seems to be a settled rule, that a conviction still subsisting, and valid upon the face of it, on a subject within the jurisdiction of the defendant as a magistrate, is a legal bar to an action for anything done under such a conviction (b). The principles on which this position rests have already been considered (c).

* It is otherwise where the subject-matter is not within the jurisdiction of the magistrate (d); or where it appears * 801

(z) *Burley v. Bethune*, 5 Taunt. 583. [1 Marsh. 220. S. C.]

(a) If the defendant obtain a verdict, or the plaintiff become nonsuited, or suffer any discontinuance, the defendant, by the same statute, is entitled to double costs, on a certificate from the Judge that he was such officer at the time of the trespass, and acting in the execution of his office. The certificate may be granted after the trial. *Harper v. Carr*, 7 T. R. 449.

(b) *Vide supra*, Vol. I, p. 225. *Strickland v. Ward*, *ibid.* *Gray v. Cookson*, *ibid.* And 16 East, 21. [*Mather v. Hood*, 8 Johns. 44.] Where an order for wages alleges that it was made on a hearing, and upon examination on oath, a plaintiff in replevin cannot, in his plea to a cognizance founded on the order, aver that the servant did not duly make oath. *Wilson v. Weller*, 1 B. & B. 57.

(c) *Supra*, Vol. I, p. 225. 7 T. R. 631. *Massey v. Johnson*, 12 East, 81. 16 East, 21. What Judges of the particular matter have adjudged is not traversable, per Holt, C. J. *Groenvelt v. Burwell*, 1 Salk. 396. And if a justice of the peace record that upon his view as a fact which is no fact, he cannot be drawn in question, either by action or indictment. 12 Co. 23. 27 Ass. 19. 1 Salk. 397. But if a constable commit a man for a breach of the peace in his presence, the fact is traversable, for he has no judicial authority; he does not commit for punishment, but for safe custody. So leather searchers, under an act of Parliament authorizing them to seize leather insufficiently dried, are liable in trespass for seizing leather which turns out to be sufficiently dried. *Warne v. Farley & others*, 6 T. R. 443.

(d) *Terry v. Huntington*, Hardr. 480.

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conviction.

from the conviction itself that he has been guilty of an excess of jurisdiction (e) As where the defendant gave in evidence four separate convictions of the plaintiff for selling bread on the same Sunday (f). For the Court were of opinion that no more than one penalty could be incurred for selling bread on the same Sunday, and therefore that the levying under the last three convictions was illegal (g).

In such a case it is not essential for the plaintiff to prove that the conviction has been quashed, for it is wholly void (h). So where the defendant, being a justice of the peace having convicted the plaintiff of destroying game, committed him to prison without first endeavouring to levy the penalty, the plaintiff having effects on which a distress might have been levied (i).

* 802 * It seems to be perfectly well settled, that if the magistrate have general jurisdiction over the subject-matter, evidence is inadmissible to show that he came to an erroneous conclusion in the particular case (k), for that is properly the subject of an appeal.

And it is not, it seems, competent to the plaintiff to show that in point of fact the justice had no jurisdiction in the particular case (l)(1). Where the question of juris-

(e) Where Justices decide on a matter not within their jurisdiction they are liable in an action. Per Hale, C. B. *Terry v. Huntington*, Hardr. 480. And special jurisdictions may be circumscribed, 1st, as to place; 2ndly, persons; 3dly, subject-matter. Ibid. And if they give judgment on matters arising in another place, or in any matter beyond their jurisdiction, all is void, as *coram non judice*. Ibid. See Cowp. 640. 8 East, 404. *Baldwin v. Blackmore*, 1 Burr. 595. 2 Bl. R. 1146.

A commitment of a former overseer until he shall have delivered up all books belonging to the parish, the complaint being that he did not deliver up a particular book, is an excess. *Groome v. Forrester*, 5 M. & S. 314.

(f) Under the stat. 29 Ch. I. c. 7.

(g) *Crepps v. Durden*, Cowp. 640. There the want of jurisdiction appeared on the face of the convictions. See the observations of Ld. Ellenborough, and of Bayley, J. in *Gray v. Cookson*, 16 East, 21.

(h) Ibid.

(i) *Hill v. Bateman*, 1 Str. 710. *Robson v. Spearman*, 3 B. & A. 493.

(k) *Gray v. Cookson*, 16 East, 21; *Strickland v. Ward*, 7 T. R. 631. *Brittain v. Kinnaird*, 1 B. & B. 432. *Supra*. 800, 1. See also *Lowther v. Earl of Rednor*, 8 East, 113.

(l) *Supra*, Vol. 1, p. 227. *Gray v. Cookson*, 16 East, 21. *Strickland v. Ward*, 7 T. R. 633. Yet in the case of *Terry v. Huntington*,

(1) [See Vol. I. p. 227, note (1). See also *Vosburgh v. Welsh*, 11 Johns. 175.]

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diction depends upon the particular facts, if, upon the adjudication by the magistrate, an excess, or total want of jurisdiction appears, the adjudication is wholly void (*m*). But if on the face of the proceedings the magistrate appears to have had jurisdiction generally over the subject-matter, and also in the particular case, it cannot in a mere collateral proceeding be inquired whether he acted erroneously or corruptly.

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a conviction.

Upon the inquiry before the magistrate it was for him to decide, in his judicial capacity, whether the evidence in point of law and fact supported the charge, or was in itself insufficient, or was rebutted by evidence on the other side. Such evidence to repel the charge might consist in proof of facts, which if true, showed that the Justice has no jurisdiction, as for instance, in a charge against one as an apprentice, it might be shown that the supposed apprenticeship either never existed * or that it had been dissolved by competent means. These, however, are facts in the cause to be decided upon the evidence, by the magistrate, as by a Jury; they may be true, or they may be false; but to a person acting in a judicial situation, by authority of law, credit is to be given that he has exercised an honest discretion over the subject-matter; and it is not to be presumed that he has decided contrary to his conscience and belief in matter of fact, for the purpose of extending his jurisdiction; and it would be contrary to the policy and principles of law to allow him to be treated as a trespasser for an error in judgment (*n*). (1)

* 803

(Hardr. 480,) where the commissioners of Excise had exceeded their authority, in adjudging low wines to be strong wines, it seems that evidence was admitted in proof of the fact, in order to negative the authority of the commissioners, in an action of trover brought to recover the value of goods levied under a warrant of the commissioners; *vide infra*, 809. And see *Fullers v. Fotch*, Holt, 287. Carth. 346. And it is clear, as a general principle, that a magistrate cannot give himself jurisdiction, in a particular case, by finding that as a fact which is not a fact. Per Lawrence, J. 8 East, 403, in *Welch v. Nash*.

(*m*) *Supra*, 801.

(*n*) See *Sutton v. Johnston*, 1 T. R. 493. 16 East, 21. 1 B. & B. 432.

(1) [Judicial officers are not liable to action or indictment for acts done by them in a judicial capacity within their jurisdiction, but only to impeachment, if they act corruptly. *Yates v. Lansing*, 5 Johns. 282. S. C. 9 Johns. 395. *Moor v. Ames*, 3 Caines' Rep. 170. *Brodie v. Rutledge*, 2 Bay, 69.

An action does not lie against a justice for entering judgment and issuing execution against two defendants, upon the confession of

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* 804

If a magistrate make an order corruptly, and against the evidence, but in a case where he has jurisdiction, a different remedy is open to the party injured (o), by appeal, (where one is given) or by a criminal information or indictment against the magistrate, for the corrupt and malicious act. The whole difference seems to * lie between a *want* of jurisdiction in the subject-matter, and an *abuse* of that jurisdiction. These principles seem to be now fully established by the case of *Gray v. Cookson* (p), where the magis-

(o) See the observations of Lawrence, J. 8 East, 119, *Lowther v. Earl of Radnor, & another*. In that case the defendants having (as justices) made an order upon the plaintiff for the payment of wages to Sopp, alleged in the order to be due to him for work and labour in digging and steaning a well, the plaintiff having made default in appearing after summons, the order was confirmed on appeal by the plaintiff to the sessions. The defendants then issued a warrant of distress, on the execution of which the action was founded; a verdict was found for the plaintiff, subject to a case, in which were stated the terms of a *special contract* between the plaintiff and Sopp, as to the making the well. But the court were clearly of opinion that the plaintiff could not make the defendants trespassers by showing that the real facts of the case would not support the complaint, without showing that such facts were proved before them at the time; and Grose, J. doubted whether the Court could look beyond the order itself. The case was ultimately decided on the ground that the defendants had jurisdiction under the stat. 20 Geo. II. c. 19, (and see 31 Geo. II, c. 11, s. 3.) to make the order in question.

(p) 16 East, 13—23. But note, that in giving judgment, Ld. Ellenborough delivered the opinion of the Court, that the apprenticeship, which was for a less term than seven years and therefore voidable by the stat. 5 Eliz. c. 4, had not been actually avoided by an act of delinquency committed by the apprentice in running away from his master. See the cases cited by Mr. Buller, Cowp. 642. where Gould, J. is said to have ruled in two instances, one in Shropshire and one in Lancashire, that although a conviction under the game laws was good in point of form, yet, that as in truth the party was not subject to the game laws, the plaintiff was entitled

one only. *Little v. Moore*, 1 Southard's Rep. 74. Nor, as it seems, for demanding excessive bail on a criminal charge. *Evans v. Foster*, 1 N. Hamp. Rep. 374.

In North Carolina, however, a justice has been held liable to an action for maliciously and unjustly refusing to grant an appeal from his own judgment. *Hardison v. Jordon*, Cam. & Nor. 454. And in Kentucky, the doctrine is thus held—that an action will not lie against a justice for a judicial act within his jurisdiction, *unless he has acted from impure and corrupt motives*. *Gregory v. Brown*, 4 Bibb, 28. In South Carolina, it is held that a justice may be indicted for corrupt or oppressive conduct. *The State v. Johnson*, 2 Bay, 385. *Lining v. Bentham*, 2 Bay, 1. In Vermont, it has been held that an indictment cannot be maintained against a justice for mal-administration, but that he is liable to a suit by the party grieved. *The State v. Campbell*, 2 Tyler, 177.]

trate having made an order as against an apprentice, it was held that the want of jurisdiction could not be established against him in an action of trespass, by evidence of the previous dissolution of the apprenticeship.

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Before the stat. 21 Jac. I, when a defence of this nature was specially pleaded, the practice was, as appears from the entries, to set out the information, and all the proceedings before the justices (*q*). And that statute did not alter the nature of the defence, but merely took away the necessity of pleading it specially. It seems, however, that proof of the conviction is sufficient, without proving the regularity of the former proceedings (*r*). The warrant must also be produced * and proved, and evidence given (if there be no * 805 internal reference) to connect it with the conviction (*s*). Proof of the conviction.

to a verdict. These decisions, however, appear to be wholly inconsistent with the principles on which the authority of the *res judicata* depends. See Vol. 1. p. 225. *Vide supra*, 802.

In *Brittain v. Kinnaird*, 1 B. & B. 432, in trespass against a magistrate for taking and detaining a vessel, it was held that a conviction of the defendants under the Bumboat Act was conclusive evidence that the vessel in question was a boat within the meaning of the Act, and properly condemned.

(*q*) See Cowp. 647. In *Hill v. Bateman*, 1 Str. 710, it was said that the magistrates must show the regularity of the proceedings, and that the information laid before them must be produced and proved in court.

In an action of trespass against two magistrates for seizing the plaintiff's goods, proof on the part of the plaintiff of a warrant of distress, signed by the defendants, and reciting an assessment for raising a composition in money in lieu of statute-duty, is not, it seems, evidence to show an adjudication by them, so as to dispense with proof of their authority to issue the warrant. *Stanley, bart. v. Fielden*, 5 B. & A. 425; and see *Grey v. Smith*, 1 Camp. 387. A magistrate is a trespasser who grants a warrant of distress upon documents laid before him, which are the acts of other magistrates, if the want of jurisdiction be manifest, *per* Bayley J. *ib*.

In order to justify magistrates in granting authority to collect a composition in lieu of stat. duty, it should be made to appear on oath before both magistrates that the road can be more effectually repaired by such composition. *Stanley v. Fielden*, 5 B. & A. 425.

(*r*) See Vol. I, p. 251; and *Strickland v. Ward*, 7 T. R. 631; where nothing more than the conviction and warrant under it were proved. And see the case of *Fullers v. Fotch*, Holt, 287. Carth. 346, where on a conviction by commissioners of excise, on trespass brought against them for taking money by virtue of their warrant, the information, judgment and warrant were offered in evidence; it was held that a copy of the conviction, from the original judgment-book kept by the commissioners, was evidence, and that the judgment recited in the conviction was sufficient proof that it had been given.

(*s*) *Strickland v. Ward*, 7 T. R. 631. *Massey v. Johnson*, 12 East, 67; and *Gray v. Cookson*, 16 East, 21, where Ld. Ellenborough

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Proof of con-
viction.

In general, an order or warrant of commitment by a magistrate must be in writing (*t*); but an order to detain in custody one convicted under the stat. 13 G. 3, c. 80, of killing game on a Sunday, and detained by order of a magistrate until the return of a warrant of distress, may be by parol (*u*). If the commitment was upon a warrant granted in defect of goods upon which a distress might be made, the defendant should prove the conviction, or demand of the penalty, the warrant of distress, and return to it, and the warrant of committal.

- * 806 It is no objection to the conviction that it has been drawn up in regular form since the time of conviction, *or even since the commencement of the action (*x*). And it seems that mere want of form in the proceedings will be immaterial, provided they show that the plaintiff was convicted of the offence for which the warrant afterwards issued (*y*). Where the warrant *recited a charge on the

says, "I had always considered, that if a conviction were produced at the trial which would justify the imprisonment, it would be sufficient." Where *T. O.* laid an information against the plaintiff on a charge of vagrancy, the plaintiff was examined and heard upon the charge, and the magistrate made out a warrant of commitment which falsely recited that the plaintiff had been charged on the oath of *T. S.* and *T. S.* negatived the fact in evidence, and a conviction was drawn up a month afterwards, but dated on the day of commitment, it was held that the imprisonment was sufficiently connected with the conviction, however informally the conviction and warrant were drawn; and that the allegation in the warrant as to the oath of *T. S.* might be rejected as surplusage. (*Massey v. Johnson*, 12 East, 67.) See also *Louther v. Lord Radnor*, 8 East, 113, where, although the defendants had convicted the plaintiff in default of appearance, no evidence further than by the recital in the order itself, was given of the service of any summons on the plaintiff. *Vide supra*, Vol. I, p. 214. 251.

(*t*) 2 Haw. c. 16, s. 13.

(*u*) *Still v. Walls*, 7 East, 533.

(*x*) *Gray v. Cookson*, 16 East, 13; and per *Ld. Ellenborough*, *ibid.* 21. *Massey v. Johnson*, 12 East, 67.

(*y*) *Massey v. Johnson*, 12 East, 67. But it must appear to the court that the party has been legally convicted of the offence stated on the face of the conviction. In the case of *Moult v. Jennings*, Cor. Eyre, C. J. cited Cowp. 642, upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared that the plaintiff had been convicted of swearing, and Eyre, C. J. said that if the nature of the oaths had not been specified in the conviction, so that they might appear to the court, the conviction would have been void. And in *Cole's case*, (Sir W. Jones, 170,) it was held by the whole court, that if a justice does not pursue the form prescribed by the statute, the party need not bring error, but all is void as *coram non judice*. So in *Goss v. Jackson*, 3 Esp. C. 198, it was held by *Ld. Kenyon*, that a conviction under

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oath of *T. S.*, and the conviction purported to be founded on the oath of *S. O.* it was held that the recital in the warrant might be rejected as surplusage, and that it might be considered as a valid commitment under the conviction as to the remainder (*z*). It should appear on the face of the proceedings, not only that the party has been convicted of an offence within the jurisdiction of the magistrate, but also that the proceedings against him were regular; that there was an information against him (*a*) on oath, where such an information is required, and that he appeared to answer the charge, or at least was summoned (*b*). And it

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conviction,
warrant, &c.

the stat. 33 Geo. III, c. 84, which varied from the form given by the statute, was void; but note, that in that case the order had not been served on the party convicted, and no demand had been made of the penalty before distress made, as the statute requires. See also *Davison v. Gill*, 1 East, 64, where it was held that an order of justices, under the stat. 13 Geo. III, c. 78, s. 19, for stopping up an old footway, and setting out a new one, which did not follow the form prescribed in the schedule, and set forth the length and breadth of the new footway, was defective, and that the objection might be taken in a collateral proceeding; for the statute requires that the form set forth in the schedule *shall* be used on all occasions. But the general rule is, that a party shall not take advantage of a defect in a collateral proceeding, where he might have taken the objection by way of appeal. (*Supra*, Vol. I. p. 253, *R. v. Grunden*, Cowp. 315.) Upon an indictment for disobeying an order of sessions, the court held that they could hear no objections to the order which did not appear on the face of it; and that where a court having competent jurisdiction has pronounced an order, as long as it remains in force it must be obeyed. (*R. v. Mitton*, 3 Esp. C. 200. *n.*) Otherwise, where the defect of jurisdiction appears on the face of the previous conviction or indictment. (*R. v. Hollis*, 2 Starkie's C. 536.) In *Mann v. Davers*, 3 B. & A. 103, a conviction of the plaintiff was held to be a good defence in trespass, although the information set forth merely charged the plaintiff with having unlawfully returned, without a certificate, from the parish to which he had been removed, without stating any act of vagrancy.

(*z*) *Massey v. Johnson*, 12 East, 67. But it was proved in fact, that *S. O.* had given information on oath, and Le Blanc, J. observed, that the case would have assumed a very different shape had there been no information on oath on which to found the proceedings.

(*a*) See *Massey v. Johnson*, 12 East, 67; and see Vol. I. p. 214. If a magistrate maliciously grant a warrant to apprehend and commit a party for felony, without any information against him, he is a trespasser, for there is a false imprisonment by some one, the party having been committed to prison without any charge having been made; and it is an imprisonment by the justice, and not by the constable, who was bound to obey the warrant. *Morgan v. Hughes*, 2 T. R. 225.

(*b*) 12 East, 82. 7 T. R. 275. In *Stanbury v. Bolt*, Cor. Fortescue, J. Trin. 11 Geo. I. cited Cowp. 642, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plain-

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* 808
Evidence in
answer to a
conviction, &c.

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mitment.

seems that even supposing the proceedings to be apparently regular, evidence would * be admissible to impeach the judgment in this respect (c).

Although a legal adjudication by a magistrate is, so long as it subsists, a bar to an action of trespass in respect of any act done by virtue of it, yet it seems to be clear, upon principles already adverted to (d), that the plaintiff may rebut the evidence of a conviction, or other judicial act, by evidence showing the total illegality of the proceedings, by proof that the act was not a judicial one, *inter partes*, but was wholly unwarranted, fraudulent and void. Thus he may prove that a warrant of commitment in case of felony was granted maliciously, and without any information to support it (e); or in case of a distress, or commitment under a conviction, that he was never summoned, and therefore had no opportunity to make his defence (f).

If the defendant justify under a commitment by him as a Justice of the peace, as in case of felony, he should be prepared to prove the information on oath, the proceedings upon it, and the warrant of commitment. If he has committed for a contempt committed against him in the execution of his office, he should be prepared to prove the circumstances of the contempt, and a committal by warrant, specifying the offence (g) (1). Under a commitment for refusing to be bound over as a witness at the assizes or sessions, the defendant should prove the informations, examinations, and depositions, the calling on the plaintiff to

tiff had been summoned, and the conviction was adjudged void for that reason only.

(c) See the observations of Le Blanc, J. 12 East, 81, 2; and *supra*, Vol. I. p. 214. [227, note (1), and *Vosburgh v. Welsh*, 11 Johns. 175.]

(d) *Supra*, Vol. I. p. 214, 15. 252. Vol. II. tit. *Fraud*.

(e) *Morgan v. Hughes*, 2 T. R. 225.

(f) *Harper v. Carr*, 7 T. R. 275. And see the cases, Vol. I. 214, 15; also *Stanbury v. Bolt*, *supra*, 807.

(g) *Mayhew v. Locke*, 2 Marsh. 377. [7 Taunt. 63. S. C. See 5 B. & A. 894.]

(1) [It seems that a justice can commit for a contempt, only where the contempt has been committed in the face of the court. *The State v. Applegate*, 2 M'Cord, 110. *Lining v. Bentham*, 2 Bay, 1. *The State v. Johnson*, 2 Bay, 385. *Richmond v. Dayton*, 10 Johns. 393. See also *Filler v. Probasco*, 2 Browne's Rep. 137. *Moor v. Ames*, 3 Caines' Rep. 170. For abusive words, while out of court, relating to his judicial character, he may require the party to find surety of the peace and for good behaviour, and in default thereof commit. 10 Johns. *ubi sup*. Or he may proceed by indictment. 2 Bay, *ubi sup*.]

enter into the * recognizance, his refusal, and the warrant of committal (*h*).

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In the case of *Terry v. Huntington* (*i*) the court seem to have been of opinion, that in an action of trespass the plaintiff might show that the commissioners had exceeded their jurisdiction, in adjudging a subject-matter to be within their jurisdiction which was not within it, i. e. in adjudging low wines to be strong wines. This, however, seems to be inconsistent with later authorities, particularly that of *Gray v. Cookson*, in these cases, the question, whether the subject-matter was or was not within the jurisdiction, was the very point upon which the commissioners in the one case, and the magistrate in the other, had to adjudicate; and therefore the same principle which protects a party who acts judicially, and gives effect to his judgments, until they have been reversed by proper authority, although he may have acted erroneously, extends to such cases, and to all where the question of jurisdiction arises upon matter of fact in the course of a cause, and therefore necessarily becomes the proper subject for adjudication in the cause. If in the case of *Terry v. Huntington* it had appeared on the face of the information that the subject-matter of the proceeding was *low wines*, whereas the statute gave jurisdiction in case of *strong wines* only, the commissioners would clearly have acted illegally in proceeding to adjudicate where they had no power by the statute to adjudicate at all. But if the information related to *strong wines* only, a subject-matter over which they had jurisdiction, they were bound to proceed; and then whether the subject-matter of the complaint upon the evidence, came within the meaning of the statute, they were bound judicially to decide.

Evidence in
answer to a
conviction.

* If amends have been tendered within a month after notice, and such tender has been pleaded, it is a question for the Jury whether the amends so tendered were sufficient (*j*).

* 810
Tender of
amends.

Where the defendant has paid money into court (*k*), having neglected to tender amends, or having tendered insuffi-

(*h*) See *Bennett v. Watson*, 3 M. & S. 1.

(*i*) Hardr. 480; and *vide supra*, 802, 3.

(*j*) 24 Geo. II. c. 44. s. 2, The tender may be pleaded, with the plea of not guilty, or any other pleas, by leave of the court, *ibid*. If the jury find the amends to be sufficient, they are to find for the defendant in such case; or if the plaintiff be nonsuited, or discontinued, or judgment be given for the defendant on demurrer, he is entitled to like costs as if he had pleaded the general issue only.

(*k*) 24 Geo. II. c. 44, s. 4.

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Defence by a constable, &c. under a warrant.

cient amends, the proceedings are the same as in other cases where money is paid into court.

III.—Before the st. 24 Geo. 2, c. 44, an officer charged with the execution of a magistrate's warrant was placed in a perilous situation; he was liable to an indictment if he refused to execute a warrant, and to a vexatious action if he did. In order to his relief the above statute was made, the object of which was to substitute the magistrate by whom the warrant was granted, and who was supposed to be cognizant of the legality of it; in lieu of the officer, who was merely the instrument to execute it, and probably ignorant of the grounds on which it issued (*l*).

* 811 By the st. 24 Geo. 2, st. c. 44, s. 6, no action (*m*) shall * be brought against any constable, headborough or other officer (*n*), or against any person acting by his order and in his aid for any thing done in obedience to any warrant under the hand or seal of any Justice of the peace until demand has been made, or left at the usual place of his abode, by the party intending to bring such action, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand; and in case after such demand and compliance therewith, any action be brought against such constable, &c. for any such cause as aforesaid, without making the justice of the peace who signed or sealed the said warrant, defendant, on producing and proving such warrant at the trial, the Jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice of the peace; and if such action be brought jointly against such Justice of the peace, and such constable, &c. then, on proof of such

(*l*) See the observations of Lawrence, J. 5 East, 448, *Jones v. Vaughan*.

(*m*) This clause embraces actions of *tort* only, and does not extend to an action brought against an officer for money had and received, which has been levied by him under a conviction which was afterwards quashed. *Feltham v. Terry*, East. T. 13 Geo. III. K. B; B. N. P. 24. See also *Irving v. Wilson*, 4 T. R. 485; *Wallace v. Smith*, 5 East, 122. It is now settled, although it had been doubted, (see Ld. Kenyon's observations in *Harper v. Carr*, 7 T. R. 270.) that the statute does not extend to actions of replevin. *Fletcher v. Wilkins*, 6 East, 283; for there would be great inconvenience in depriving the subject of his remedy by replevin; it might happen that no damages could compensate for the loss of the particular chattel of which the party might be for ever deprived, if he could not sue in replevin. *Milward v. Caffin*, 2 Bl. R. 1330.

(*n*) Churchwardens and overseers of the poor, acting under a warrant of distress for a poors rate, are within these words, when sued in actions to which the statute extends. *Harper v. Carr*, 7 T. R. 271.

warrant the Jury shall find for such constable, &c. notwithstanding such defect of jurisdiction (o) (1).

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* The defendant in order to avail himself of this clause must produce and prove the warrant (p) (2)*, by evidence of the Justice's hand-writing, &c., and show that he acted in obedience to it (q). The principal test for ascertaining whether the defendant has acted in obedience to the warrant is to inquire whether the magistrate would be liable for the act of the defendant, for where he would not be

* 812

Defence under
a warrant.

(o). The general requisites of a warrant are, 1st. That it be under the *hand and seal* of the Justice. (2 Inst. 52. 2 Hale, 111.) 2ndly. Must express the *date*, in order to show that it was prior to the arrest. (2 Hale, 111; Dalt. c. 117—121.) But the *place*, it seems, need not be stated, although it must be averred in pleading; the county, however, ought at all events to be set forth in the margin, if not in the body. (2 Haw. c. 13. s. 23. Dalt. c. 117. 121.) 3rdly. Must state the *offence*, which may be done generally, in case of treason or felony; in other cases it seems that the special cause should be set forth, so far at least as to show the nature of the offence, and the jurisdiction of the magistrate, (2 Haw. c. 13. s. 25. 2 Hale, 111.) It ought not to be *general* to answer such matters as shall be objected against him, for then it will not appear whether the offence be within the jurisdiction of the magistrate, or whether it be bailable or not. (2 Inst. 52. 591; 2 Hale, 111.) Hence a general warrant to arrest all persons suspected of an offence (*Swallowes's case*, 24 C. 1; 2 Hale, 112), or to search all suspected houses (2 Haw. c. 13, s. 17), or to seize persons guilty of a specified offence, is illegal. (Ibid. and see *Money v. Leach*, 3 Burr. 1742. *Entick v. Carrington*, 2 Wils. 275. 11 St. Tr. 321;) and 4thly, the warrant may be general to bring the party before any Justice of peace of the county, or special, to bring him before the Justice who granted it; (2 Hale, 112, *Foster's case*, 5 Co. 59. b.) In the former case, it seems to be in the election of the officer to go before whom he pleases. Adjudged, 5 Co. 59, b. *Foster's case*, against the opinion of Fineux, 21 H. 7. 21, a. 2 Hale, 112. [See Davis's Justice, chap. III.]

(p) As to the form of the warrant, *vid. supra*. Note (e).

(q) See 3 Burr. 1767. [See *Kerlin v. Heacock*, 3 Binney, 215.]

(1) [An action of trespass against a constable, who arrested a plaintiff on a warrant for a debt, and assaulted and beat him, was held to be within the statute of Pennsylvania, which requires a copy of the warrant to be demanded. *Osborn v. Burkett*, 1 Browne's Rep. 393.]

(2) [A warrant by a justice, not directed to any particular person in office, is bad. *Hall v. Moor*, Addison's Rep. 376. But a warrant, directed to — constable, is good, if executed by the constable of the district. *Paul v. Vankirk*, 6 Binney, 124.]

A constable, justifying under process from a justice, need not produce written evidence of the justice's appointment: Oral evidence that he has acted as such is sufficient. *Noland v. Moore*, 2 Littell's Rep. 367. A warrant issued by a justice may be good, although his name only is signed, without the addition of his official character. *Siler v. Ward*, 1 Car. Law Repos. 548.]

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a warrant.

* 813

liable, the officer is not within the protection of the statute (*r*). As where a bailiff, on a warrant to take up a disorderly person under the vagrant act (*s*) takes up one who is not so (*t*), or being authorized to apprehend the author, printer or publisher of a libel, executes it on one who is neither the author, printer or publisher (*u*). So where bailiffs in order to * levy a poor's rate under a warrant of distress, break and enter a house, and break the windows (*x*); or where a bailiff executes a warrant in a place beyond the limits of its legal operation (*y*). Or in general

(*r*) Per Ld. Mansfield, 3 Burr. 1768. B. N. P. 24. 1 Bl. Rep. 555. 2 M. & S. 260.

(*s*) 17 Geo. II.

(*t*) 3 Burr. 1767.

(*u*) *Money v. Leach & others*, 3 Burr. 1742, note, the warrant under the hand and seal of Ld. Halifax, one of his Majesty's principal secretaries of state, directed the defendants to bring the author, &c. before him, but they discharged the plaintiff by the earl's order, without carrying the defendant before him. In *Entick v. Carrington*, (2 Wils. 275,) it was observed by the Court, that the defendants had not taken a constable with them as directed by the warrant, and that they had not pursued the warrant in the execution thereof, inasmuch as they had carried the plaintiff and his books before Lord Stanhope, and not before Lord Halifax, as directed by the warrant, which was wrong, because a secretary of state cannot delegate his power, but ought to act in this part of his office personally, and therefore, and also because the Court held that a secretary of state is not a justice of the peace, it was decided that neither a secretary of state, nor the messengers, were within the stat. 24 Geo. II. c. 44.

(*x*) *Bell v. Oakley & others*, 2 M. & S. 259.

(*y*) *Dawson, or Lawson v. Clarke*, cited 3 Burr. 1761. 1767. *Milton v. Green*, 5 East, 233. A constable cannot justify the execution of a warrant except within the district or place for which he is appointed. Where a warrant to search for nets was directed "to the constable of Shipborne, to Samuel Carter, and to all other officers of the peace in the county of Kent," it was held that the defendant, who was borsholder of Little Peckham, which adjoined to Shipborne, could not justify the execution of the warrant in Shipborne, being neither constable of Shipborne, nor Samuel Carter; and the general description, it was held, was to be construed "*reddendo singula singulis*" as directed to each constable in his own district. (*Blatcher v. Kemp*, 1 H. B. 15, in not. Cor. Ld. Mansfield. And see 2 Ld. Raym. 1296, *The Queen v. Tooley*. 1 Salk. 175, *Case of the village of Chorley*. Fost. 312. 2 Bl. R. 1135, *Hill v. Barnes*.) The reason is, that if the execution of warrants were granted to mere strangers, force would often be repelled with force, and infinite mischief would attend the departure from the ancient rules of local Magistracy. But if a warrant be directed to a constable by name, he may execute it any where within the scope of the warrant and the jurisdiction of the justice, (ibid. and Bac. Ab. tit. *Constable*, D.) In Westminster constables are to be appointed out of different

* where the officer exceeds his authority in the execution of the warrant, or executes it in an illegal manner (z).

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parishes for the whole city and liberty, by 29 Geo. II. c. 25; and in London, by ancient custom, the constables of the 26 wards have power to execute warrants throughout the city. (Bac. Ab. Ed. 6. tit. *Constable*, D.) A constable to whom a warrant is directed, may for special cause only, as sickness, execute it by deputy, *ibid.* Roll. Ab. 591. Moor, 845. Crompt. 222. 3 Bulst. 77. 3 Burr. 1259.

If a magistrate by his warrant direct it to be executed in G. the constable is justified in executing it there, though the place be beyond the magistrate's jurisdiction; *per* Lord Ellenborough, 5 East, 237.

If a warrant of distress be directed to A. B. collector of W., the constables of the said parish, and all other his majesty's officers, it cannot be executed by constables of W. out of W. *R. v. Weir*, 1 B. & C. 288; see *R. v. Tooley*, 2 Ld. Ray. 1296. But now see the st. 5 G. 4. 18.

(z) See 2 Hale, 115. 2 Haw. c. 13, s. 28. Bailiffs and constables sworn as, and commonly known to be, officers, are not bound to show their warrant to the party, but private persons to whom warrants are directed, and even sworn and known officers, if they act beyond their own precincts, are bound to show their warrants if demanded. (2 Haw. c. 13, s. 28. 6 Co. 54. 9 Co. 69. 1 Hale, 583. 2 Hale, 116.) So in executing a warrant of distress of a justice of the peace to levy a penalty, they must show the warrant if required, and suffer a copy to be taken by the stat. 27 Geo. II. c. 28. It is enough for a sworn and known officer to say, "I arrest you for felony, &c. in the King's name." (2 Hale, 116, 8 Edw. IV. 14. a. 14 Hen. VII. 9. b. 9 Co. 69, *Mackally's* case.) It may be executed in a franchise within the county, for it is the King's suit in which a *non omittas* is virtually included. (2 Hale, 116.) But it cannot be executed out of the officer's precinct, unless specially directed to him. 2 Haw. c. 13, s. 30; & *supra*, 814.

After the arrest he must bring the party to gaol, or to the magistrate, according to the import of the warrant. (2 Hale, 113, and *supra*, 812, in the note). But if the time be unseasonable, or if there be danger of rescue, or if the party be sick, and not able at the present to be brought before a justice, the constable may secure him till the next day, or till such time as may, under the circumstances, be seasonable. (2 Ed. 4. 9 & 10; and 2 Hale, 120.) And after he has brought him before the justice, the party is still in his custody until the justice discharge or bail him, or till he be actually committed. 10 H. 4. 7, a; and 2 Hale, 120.

Doors can in no case be broken, without previous notification of the cause, and request to admit. (2 Haw. c. 14. s. 1. 2 Hale, 116, 7. Fost. 320.) A constable may justify on a warrant to arrest for felony, and even on a warrant to arrest for breach of the peace, an officer may break open the doors of the party. (Dalt. c. 78. 1 Hale, 582. 2 Hale, 117. 2 Haw. c. 14. s. 3.) So he may under a warrant of a justice to levy a forfeiture in execution, on any stat. which gives the whole or any part of the forfeiture to the king. (2 Haw. c. 14. s. 5.) So under a warrant to arrest for felony, or breach of the peace, the officer may break the doors of another house. (2 Hale, 117. 5 Co. 93. Fost. 319.) But if the felon be not there he is a trespasser. *Semaine's* case, *ibid.* [Yelv. 29, note.] An

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* It is said that if the defendant act in obedience to the warrant he is under the protection of the statute, not only where the magistrate wants jurisdiction over the subject-matter, but also where the warrant itself is illegal (1). For the policy on which this clause of the act was founded requires that an officer who really acts in obedience to the warrant of a magistrate shall be protected (a), and he is not to judge of the legality of the warrant. A warrant recited a complaint upon oath, that a quantity of sugar had been stolen from a ship in the Thames, and that there was just cause to suspect that the same goods were knowingly concealed or deposited in the premises occupied by Price & Co. (the plaintiffs), and then directed the defendants to search for and secure the said goods. The defendants under this warrant seized a quantity of sugar which they found on the premises of the plaintiffs, but which turned out to be the property of the plaintiffs. The Court held that this seizure was made in obedience to the warrant, for

An officer may lawfully break open doors after proper notice, and refusal, under a warrant, to search for stolen goods, and although no stolen goods be found there. (2 Hale, 157.) But it is there said, that the owner is justified, or otherwise, according to the event; and see *Bostock v. Saunders*, 2 Bl. Rep. 912. S. C. 3 Wils. 434. This however, seems to have been overruled in the case of *Cooper v. Booth*, 3 Esp. C. 135. & *vide infra*, 818, 9.

Where one known to have committed treason or felony, or to have given a grievous wound, is pursued, even by a private person, *without warrant*, he may break open doors to take the offender; but it seems that *no one* would be justified in doing this *without a warrant* on mere suspicion. See 2 Haw. c. 17, s. 7, and the authorities there cited. Fost. 321. 1 Hale, 582.

A demand of admission is necessary in execution of process for a misdemeanour. *Launock v. Brown*, 2 B. & A. 592. Doors may be broken after notification, in order to arrest on the Speaker's warrant for a contempt of the House of Commons. *Burdett v. Abbott*, 5 Dow, 165; 14 East, 1; 4 Taunt. 401. A sheriff in executing civil process against the person of *A. B.*, is justified or not in entering the house of a stranger to take *A. B.*, according to the event. *Johnson v. Leigh*, 6 Taunt. 246. [1 Marsh. 565. S. C.]

(a) See the observations of the Court, 2 B. & P. 161, *Price v. Messenger*; but *qu.* whether the officer would be protected where he was directed by the warrant to do that which was manifestly illegal. See the observations of Eyre, C. J. 2 Wils. 291; and 4 Bl. Comm. 291.

(1) [In Pennsylvania—if a constable has pursued his warrant, he can be affected by want of jurisdiction in the magistrate only when he is sued alone, having, after a proper demand, refused to furnish a copy of the warrant for six days: But when he is jointly sued with the magistrate, whether after demand and refusal or not, and has pursued his warrant, he is entitled to an acquittal. *Jones v. Hughes*, 5 Serg. & Rawle, 302.]

the defendants had executed it in the * only way in which it was capable of being executed, that is by making it attach on all goods which fell within the description contained in it; they had acted with as much precision in the execution of the warrant as the magistrate had done in the granting of it (b).

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Where the defendant has acted in obedience to such a warrant, it is incumbent on the plaintiff to prove (c) that a demand has been made, or left at the usual place of the defendant's abode, by himself or his attorney, in writing (d), signed by the party demanding the same, of the perusal and copy of such warrant (e). A written demand signed by the attorney is sufficient (f).

The defendant may answer such proof by evidence that he did grant the plaintiff a perusal and copy of the warrant within the six days prescribed by the statute, or even at a subsequent time, provided it be before the commencement of the action (g), and will then be entitled to a verdict, notwithstanding any defect of jurisdiction in the magistrate (h).

If the officer fail to bring himself within the protection of the statute, he stands in the same situation as at common law, and the rule seems to be that the officer is justified in executing a warrant, legal in itself, granted by one who had a general jurisdiction over the subject-matter, although it was erroneously or corruptly * granted in the particular case (i). It would manifestly be unjust, that a

(b) *Price v. Messenger & others*, 2 B. & P. 158. See also *Smith v. Wiltshire*, 2 B. & B. 619; where constables, under a warrant to search for black cloth which had been stolen, took cloth of other colours, and it was held that they were within the protection of the stat. and that an action must be commenced within the six months.

(c) Such proof is usually given as part of the plaintiff's original case; but it seems to be competent to him to rely on proof of the trespass in the first instance, and to prove the demand in reply.

(d) As to proof of the service of the notice. *Vide supra*, 794.

(e) By the stat. 22 Geo. II, c. 44, s. 5.

(f) *Jory v. Orchard*, 2 B. & P. 39.

(g) *Jones v. Vaughan*, 5 East, 448.

(h) If the magistrate be joined, and a verdict be given against him, then by the stat. 22 Geo. II. c. 44, s. 6, the plaintiff shall recover his costs against him, to be taxed in such a manner as to include the costs which the plaintiff is liable to pay to the defendant, for whom the verdict is so found.

(i) 2 Haw. c. 13, s. 11. *Terry v. Huntington*, Hardr. 484. Bac. Ab. tit. Constable, D. *Hill v. Bateman*, 1 Str. 710. [*Paul v. Van-kirk*, 6 Binney, 124. *Warner v. Shed*, 10 Johns, 138. *Haskell v.*

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mere ministerial officer, who was bound at his peril to execute the process, should suffer for doing what he supposed to be perfectly legal in the execution of a warrant apparently valid, and which was rendered illegal by fact not within his knowledge. But it is a general principle of law, that where Courts of Justice *assume a jurisdiction* which they do not possess, an action of trespass lies against the officer who executes process, because the whole proceeding was *coram non judice*; and where there is no jurisdiction there is no judge, and the proceeding is as nothing (*k*) (1). And therefore, where a Justice on a conviction on the Game Laws issued a warrant of commitment to prison, without first endeavouring to levy the penalty on the goods of the party convicted, it was held that the constable who had executed the warrant was justified, although the Justice was a trespasser (*l*). So if a Justice were maliciously to grant a warrant of commitment for felony, without information on oath (*m*) (2). But it was held, that if a Justice had no authority to apprehend * a party in respect of the matter specified in the

Sumner, 1 Pick. 459. *Yelv.* 42. *a. note.*] The contrary has been asserted, and the case 10 H. 7. 17, has been much relied on as an authority for the assertion. There it was held that one who by the order of a bishop arrested another for saying that he was not bound to pay tithes, was a trespasser, as it could not be justified by the stat. 2 Hen. IV. c. 15, which authorizes bishops to arrest for heresy. The answer is, that there the order itself was *manifestly illegal*, besides, it was not in writing. See 2 Haw. c. 13, s. 11.

(*k*) P. C. in *Perkin v. Proctor & another*, 2 Wils. 384. *Case of the Marshalsea*, 10 Co. 76. a. b. As where a rate is unduly made, the warrant of justices will not excuse the churchwardens of the poor, who distrain for it. *Nichols v. Walker & Carter*, Cro. Car. 395. See *Brown v. Compton*, 8 T. R. 424, in which the case of *Orby v. Hales*, 1 Ld. Ray. 3, was overruled. But see p. 811, n. (*n*).

If a justice of the peace make a warrant to a constable to arrest a man in an action of debt, such a warrant will not justify the constable, because he was not obliged to obey it; and must take notice, at his peril, that it was in a matter concerning which the justice had no jurisdiction. *Morse v. James*, Willes, 122.

(*l*) *Hill v. Bateman*, 1 Str. 710.

(*m*) *Morgan v. Hughes*, 2 T. R. 225. But a magistrate may grant a warrant on reasonable suspicion, although there be no direct charge on oath. *Elsee v. Smith*, 1 D. & R. 202.

(1) [See *Yelv.* 42. *a. note* (1), and cases there collected. *Keilw.* 106. *Sanford v. Nichols & al.*, 13 Mass. Rep. 286. *Pearce v. Atwood*, *ibid.* 324. *Hoit v. Hook*, 14 Mass. Rep. 210. *Cable v. Cooper*, 15 Johns. 152. *Butler v. Potter*, 17 *ib.* 145. *Conner v. Commonwealth*, 1 Binney, 38.]

(2) [But the officer may justify under a warrant, which is regular on the face of it, without showing that it was founded on a complaint under oath. *Sanford v. Nichols & al.*, 13 Mass. Rep. 286.]

warrant, but only to issue a summons, then there being no pretence for the jurisdiction, the warrant would be no justification to the officer (*n*). So if it appear on the face of the warrant that the offence is one over which the Justice of Peace had no jurisdiction (*o*). So if he issue a warrant to bring the party before him, at a place out of the county for which he is a Justice (*p*); so if the warrant on the face of it be void and illegal for uncertainty; as, if it be a general warrant to apprehend all persons suspected of a particular offence, without naming any; for it is the duty of the magistrate, and not of the officer, whose duty is ministerial, to judge of the grounds of suspicion; and whether a particular person be guilty or not, is a fact to be decided on a subsequent trial (*q*). So a churchwarden or overseer is a trespasser in executing a warrant of distress under a rate illegally made, as in an extra-parochial place, for there was no jurisdiction (*r*).

It has been laid down by Lord Hale (*s*), that although an officer, who under the warrant of a Justice of the peace breaks open doors to search for stolen goods, is justified, although none be eventually found, yet that the owner is justified or not, according to the event; and in *Bostock v. Saunders* (*t*), on similar grounds, it was held that an excise officer was liable in trespass for breaking and entering the plaintiff's house under a warrant of commissioners, granted upon his own information, to search for tea suspected to have * been concealed there (*u*), none having in fact been * 819 found. But in a subsequent and similar case (*x*) it was held, that since the warrant was granted upon the judgment of the commissioners, warranted by oath, the action was not maintainable. The commissioners had authority

(*n*) *Shergold v. Holloway*, 2 Str. 1002. 2 Sess. C. 100. No. 100.

(*o*) Bac. Ab. tit. *Constable*, D. 14 Hen. VIII. 16. Crompt. 147, 8, 9.

(*p*) Ibid.

(*q*) 4 Bl. Comm. 291; 3 Burr. 1372; 1 Bl. R. 562; 11 St. Tr. 307. 321; Comm. Jour. 22 & 25; Ass. 1766; 2 Wils. 275.

(*r*) *Nichols v. Walker*, 2 Roll. Ab. 560; 2 Hale, 119; Cro. Car. 394. *Vide supra*, 811, note (*n*).

(*s*) 2 Hale, 150.

(*t*) 2 Bl. R. 912, and 3 Wils. 434.

(*u*) Under the stat. 10 Geo. I. c. 10, s. 13; which enacts, that in case any officer, &c. shall suspect any tea, &c. to be concealed, with intent to defraud, &c. on oath made to the commissioners, &c. setting forth the grounds of his suspicion, it shall be lawful for them to authorize the officer to enter such house, &c. See also as to warrants to search for stolen goods, the statute 22 Geo. III. c. 58.

(*x*) *Cooper v. Booth*, 3 Esp. C. 135.

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to issue the warrant; it was legal when it was issued, and when it was executed; and (Ld. Mansfield observed) it would be a solecism to say that the legal execution of a legal warrant could be a trespass. It was also held, that it was not incumbent on the defendant to prove at the trial that he had reasonable or probable grounds for laying the information; for by the Act the oath of the officer is made evidence of the truth of the fact; and the probability of the suspicion is left to be judged of by the magistrate.

IV. A constable who acts without a warrant, or who does not act in obedience to the warrant, is, it has been held, within the protection of the 8th section the stat 24 G. 2, c. 44. (y); and the words in the stat. 21 J. 1. c. 12, s. 5, by *virtue of their office*, apply to all cases where the party intends to act in the character of a constable, although he acts improperly, for where he really acts in the course of his office he wants no protection from the statute (z). And
* 820 therefore, if a constable * of his own authority, and without any warrant, and without any reasonable or probable cause (o), arrest a party on a charge of felony, and carry him before a magistrate, the *venue* must be laid in the pro-

(y) *Supra*, 796. As where a constable, acting under a warrant to seize the goods of *A.*, seizes those of *B.*, the action must be brought within six months. *Parton v. Williams*, 3 B. & A. 330, overruling the case of *Postlethwaite v. Gibson & another*, 3 Esp. C. 226. And see *Theobald v. Crichmore*, 1 B. & A. 227.

(z) Per Abbott, L. C. J. 2 Starkie's C. 445; and see *Alcock v. Andrews*, 2 Esp. C. 541 n.; where Ld. Kenyon observed, that where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends. And see *Theobald v. Crichmore*, 1 B. & A. 227; where a constable, who had broke into a house to levy a church-rate, granted under the stat. 53 Geo. III. c. 127, was held to be within the 12th section, which requires an action for any thing done in pursuance of the act to be brought within three months; and Ld. Ellenborough observed, that the object of the clause was clearly to protect persons acting illegally, but in supposed pursuance of the statute, with a *bona fide* intention of discharging their duty. *Supra*, 800.

(o) In *Isaacs v. Brand*, 2 Starkie's C. 167, Lord Ellenborough intimated his opinion in point of law, that a charge made by a principal thief, on his apprehension, against a party for receiving the goods, did not authorize an arrest by the officer without a warrant; but it was left to the Jury to say whether there was probable cause. In *Hill v. Yates*, 2 Moore, 80, [8 Taunt. 182. S. C.] where a constable acted under the statute 15 C. 2, c. 2, s. 2, which authorizes a constable to arrest persons whom he suspects to be conveying a burthen of young trees, it was said that the question of probable cause, was for the Judges, and that it could not be left to the Jury. *Vide* Vol. I. p. 426.

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per county (a); and he cannot without a warrant justify an arrest for a breach of the peace, which is not committed within his own view (b), unless a wound has been given which is likely to occasion death (c); but it is a justification to show that the plaintiff was committed to his custody on a legal charge, provided he acted *bona fide*, and without collusion (d). If there be no evidence of collusion, in such a case he is in point of law entitled to a verdict (e). It seems, however, that a constable is not bound to act on a charge made by another, in respect of an offence committed in the absence of the constable (f). And if a reasonable charge be made, it is a good defence to him * under the general issue, although he afterwards, and on further inquiry, discharges the accused without taking him before a magistrate (g), and although it afterwards turn out that the charge was wholly unfounded (h). So, although no specific charge be made to the constable, yet if a felony has been committed, and information of the felony, and its circumstances, has been communicated to the constable, but no specific charge is made against any one, he will be justified in arresting a party whom he suspects to have

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(a) Under the stat. 21 Jac. I. c. 12, s. 5. *Staight v. Gee & Garver*, 2 Starkie's C. 445.

(b) *Coupey v. Henley & others*, 2 Esp. C. 540. 2 Haw. c. 13, s. 8.

(c) *Ibid.*

(d) *White v. Taylor and Simcoe*, 4 Esp. C. 80. The defendant Simcoe had made a malicious charge of felony against the plaintiff to the defendant Taylor, a constable at the watch-house, who committed him upon it to the Comptor. On an action of trespass Taylor was acquitted, and Simcoe found guilty.

(e) Per Le Blanc, J. *ibid.*

(f) *Ibid.*

(g) *McCloughan v. Clayton & another*, Lancaster Summer Ass. 1816, Cor. Bayley, J. MS. And 1 Holt's C. 478.

(h) *White v. Taylor*, 4 Esp. C. 80. *McCloughan v. Clayton*, 1 Holt's C. 478. In *Samuel v. Payne*, Doug. 359, Ld. Mansfield said, "If a man charge another with felony, and require an officer to take him into custody, it would be most mischievous if the officer were first bound to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable." In that case, after a search warrant granted, no goods having been found, the defendant who first made the charge, and Payne a constable, and his assistant, arrested the plaintiff on a Saturday, he was detained till Monday, and then discharged, after examination before a magistrate; there was a verdict against all three; but the Court afterwards held that the charge was a sufficient justification to the constable and his assistant, and cited *Ward's case*, Clayton, 44. pl. 76. 2 Hale's P. C. 84. 89. 91. And Haw. b. 2. c. 12, s. 13.

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committed the felony, but who turns out to be innocent, provided he act *bona fide* in pursuit of a supposed felon (i).

* Although one who acts in aid of a constable is within the protection of the stat. 21 J. 1. c. 12, s. 5, (k), as to the *venue*, and as to his defence under the general issue; yet one who is the prime mover, and who sets the constable in motion, by making a complaint and charge to him, is not within the statute (l); and where there is a doubt whether a private person acted as the prime mover, or merely acted in aid of the constable

(i) *Ledwith v. Catchpole*, Cald. 291. Smith had lost linens; Stevens came with Smith to the defendant, a marshalman to the Lord Mayor, and Stevens informed the defendant that one Madox had put the linens into a hackney coach at a public house; that the plaintiff put his head into the coach there; that afterwards the coach stopped at another house, and that the plaintiff met it there; Smith suspecting the plaintiff to have been concerned in the theft, took the defendant on a Sunday to the plaintiff, in order to have him apprehended, but when they came neither Smith nor any other person charged the plaintiff with felony; Smith said, "I have lost some cloth, but I do not say it was he who stole it; I know nothing of that; but stolen it was." The defendant then arrested the plaintiff, who was discharged the next day by the magistrate. The defendant pleaded the general issue, and the plaintiff had a verdict for 20*l.*; but the Court granted a new trial. *Ld. Mansfield* observed, "the first question is, whether a felony has been committed or not? And then the fundamental distinction is, that if a felony has been actually committed, a private person may, as well as a peace officer, arrest; if not, the question always turns upon this, was the arrest *bona fide*; was this act done fairly, and in pursuit of an offender, or by design, or malice and ill-will? Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea ports, it would be a terrible thing, if, under probable cause, an arrest could not be made; and felons usually are taken up upon descriptions in advertisements. Many an innocent man has been and may be taken up upon such suspicion; but the mischief and inconvenience to the public in this point of view is comparatively nothing. It is of great consequence to the police of the country; I think there should be a new trial." Note, that *Buller, J.* doubted whether the constable was justifiable, since to hold that he was, would imply that he was to some purposes a judicial officer, which he said was going farther than had yet been adjudged him, *tamen qu.* for to a certain extent, even a private person is justified, or not, in arresting according to the particular circumstances of suspicion on which he must exercise his discretion. See *Haw. b. 3, c. 12, s. 2*; and *4 Taunt. 34*.

(k) *Supra*, 800.

(l) *Mac Cloughan v. Clayton*, 1 Holt's C. 478. 2 Starkie's C. 445. Because, as is said, the person who puts the constable in motion, is *prima facie* a trespasser, and therefore ought to allege and prove the truth of the suggestions on which he induced the constable to act.

A.

* who undertook to act as of his own authority, is a question of fact for the jury (*m*). A private person may, as well as a constable, justify the arrest of one actually guilty of treason or felony (*n*), or who has given a wound likely to prove mortal. And if a felony has been committed, although not by the party arrested, a private person may justify the arrest, if he acted *bona fide* upon fair and sufficient grounds of suspicion (*o*); such a defence must, however be specially pleaded (*p*). Where no treason or felony has been committed, or dangerous wound given by *any one*, it seems that a private person cannot at common law justify an arrest upon suspicion; except, indeed where

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A. being robbed, suspects B. and delivers him in charge to a constable present; trespass is maintainable against A. *Stonehouse v. Elliot*, 6 T. R. 315.

(*m*) *Staight v. Gee & Garver*, 2 Starkie's C. 445; where it was so left to the jury by Abbott, L. C. J.

(*n*) Haw. b. 2, c. 12, s. 15. It is there said that a private person who is not himself induced to believe that the party is guilty, would not be justified in arresting him by command of a constable. [See *Wakely v. Hart & al.* 6 Binney, 316.]

A private person, without warrant, may arrest, 1st, If there be a felony done; 2dly, if the party arresting has probable cause, which is traversable; 3dly, the arrest must be by the party suspecting. *Sir Anthony Ashley's Case*, 12 Co. 92.

A private person, without warrant, cannot justify the breaking doors to take a suspected person, unless he be the actual felon. 1 Hale, 82.

But he may justify the breaking and entering the house of another, and imprisoning him to prevent him from committing a felony. *Hancock v. Baker*, 2 B. & P. 260.

(*o*) See Haw. b. 2, c. 12, s. 8, 9, 10, &c.; where a number of justifying causes of suspicion are enumerated, some of which are very large and indefinite, such as "Common Fame,"—"Keeping company with persons of scandalous reputation,"—"Behaving in such a manner as to betray a consciousness of guilt." It is laid down as essential, that the party himself who arrests must be induced by the grounds of suspicion to believe the party arrested to be guilty. See *Ld. Mansfield's* observations in *Ledwith v. Catchpole*, Cald. 291. Whether the grounds of suspicion are sufficient to justify the party so arresting seems to be a question of law. (Haw. b. 2, c. 12, s. 18; 2 Inst. 52; 2 Hale, 78; Finch, 340. *Mure v. Kay*, 4 Taunt. 34.) And the grounds must be set forth in pleading the justification, in order that the court may judge whether the suspicion was reasonable, (*ibid.*) and unless the plea set forth the causes of suspicion with certainty, it will be bad on demurrer. *Ibid.* See also *Guppy v. Brittlebank*, 5 Price, 525, where the plaintiff had uttered forged bank notes at a fair, and the defendants took him before a magistrate, it was held that the facts afforded a sufficient plea of justification.

(*p*) See the last note; and *Mure v. Kay*, 4 Taunt. 34.

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the hue and cry has been raised, and there is no reason to suppose that it is groundless (*q*). A private person * cannot arrest for any offence inferior to felony, not committed within his view; but if an affray be committed in his presence he may stay the affrayers till the heat be over, and then deliver them to the constable (*r*), and also stop those who are going to join either party (*s*). So also a private person may at common law lawfully lay hold of one committing treason or felony, or doing any act which would manifestly endanger the life of another, and detain him till it may reasonably be supposed that he has changed his purpose (*t*).

KNOWLEDGE.

See tit. COIN.—FORGERY.—NEGLIGENCE.—NOTICE.

LANDLORD AND TENANT.

See EJECTMENT.—USE AND OCCUPATION.—WASTE.

LARCENY.

Particulars of
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UPON an indictment for larceny (*a*) it is necessary to prove, in ordinary cases, 1st. A *caption* and *asportation*; 2d. With a *felonious intention*; 3d. Of the * *goods and chattels of another*, as described in the indictment. And where there has been a *bailment* of the goods to the prisoner by the owner, it is further necessary to prove, either 1st, a *felonious intent* on the part of the prisoner, in *procuring the delivery* to him, which defeats the bailment, or that the delivery was procured *by force or duress*; or, 2dly, that be-

(*q*) Haw. b. 2, c. 12, s. 16. The Hue and Cry is the pursuit of an offender from town to town till he be taken, which all who are present when a felony is committed, or dangerous wound given, are by the common as well as statute law bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 Inst. 116, 7. 1 Hale, 588. 2 Hale, 99. 102. Haw. b. 2. c. 12, s. 5. As to the mode of raising the Hue and Cry, see Haw. b. 2. c. 12, s. 6.

(*r*) Haw. b. 2. c. 13, s. 8. [*Phillips v. Trull*, 11 Johns. 486.]

(*s*) Haw. b. 1. c. 63.

(*t*) Haw. b. 2. c. 12, s. 19.

(*a*) See the different definitions of larceny, East's P. C. 533. The true meaning of larceny is "the felonious taking the goods of another, without his consent and against his will, with intent to convert them to the use of the taker." Per Grose, J. in delivering the opinion of the court. *Hammon's case*, Leach, 1089.

fore the asportation the *bailment* had been *determined* by the tortious act of the bailee ; or, 3dly, that the bailment had been *determined* by *performance* of the condition.

1st. A caption and asportation : the latter seems necessarily to include the former, although the converse is not true, for there may be a taking into the possession without an asportation or removal. To constitute a caption, the property must have been taken into the possession of the prisoner. Therefore, where the prisoner cut the girdle of another, and in consequence the purse fell to the ground, but was not otherwise taken possession of by the prisoner, it was held to be no felony (*b*) ; but a momentary possession is sufficient (*c*). It need not be by force (*d*) ; and it is not purged by a re-delivery (*e*) ; and the least removal is sufficient to constitute an *asportation* (*f*). As if plate be taken out of a trunk and laid beside it (*g*) ; or the goods be removed from one end of the waggon to the other (*h*) ; or an ear-ring be forced by violence from the ear, and fall upon the hair (*i*) ; proof that the skins of sheep * were taken, and the carcasses left, is evidence of the stealing of the sheep (*l*). The pulling of wool from the back of a lamb is a sufficient asportation (*m*). There must, however, be an actual and complete *removal* of the thing from the place, after it has been taken into the possession of the prisoner. And, therefore, the setting a bale of goods on one end without removing it to a different place, is not an asportation (*n*) ; and where a purse taken by the prisoner from the pocket of another, remained still attached by a string to keys in the pocket, it was held that the asportation was not complete (*o*) ; and so it was held where goods remained attached by a string to part of the shop (*p*). * 826

(*b*) 1 Haw. c. 54. 1 Hale's P. C. 532. Dalt. 100. Cromp. 34.

(*c*) *R. v. Peat*, Leach, 267. Hale, 533. 3 Inst. 69.

(*d*) East's P. C. 687.

(*e*) 3 Inst. 69. Staunf. 27. 1 Hale, P. C. 533.

(*f*) 1 Haw. c. 33.

(*g*) Kel. 31. 1 Hale, P. C. 508.

(*h*) *R. v. Corslet*, Leach, 272. S. C. East's P. C. 556.

(*i*) *R. v. Lapier*, Leach, 360. 1 Haw. c. 33. 3 Inst. 108, 109. 2 Vent. 215. 7 Ass. 39. 1 Hale's P. C. 508. Dalis. 21. Cromp. 30. *R. v. Simpson*, Kel. 31.

(*l*) *R. v. Rawlins*, East's P. C. 617.

(*m*) *R. v. Martin*, Leach, 205.

(*n*) *R. v. Cherry*, East's P. C. 556.

(*o*) *R. v. Wilkinson*, 1 Hale's P. C. 508. East's P. C. 556.

(*p*) *Cherry's case*, East's P. C. 556. *Farrell's case*, Leach's C. C. L. 266. East's P. C. 557.

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A caption and asportation by the hand of one, is that of all who are present aiding and abetting (*q*); and it is not essential to prove that they were done immediately and directly by the prisoner, it is sufficient to show that he committed the act by means of an innocent instrument (*r*). After the goods have once been stolen the prisoner is guilty of a fresh felony wherever he carries the goods, for the property is not altered; and therefore, where goods are stolen in one county and carried into another, the prisoner is guilty of a felony in the latter county (1).

2dly, That the taking was *felonious*.—It is the peculiar province of the jury to decide upon the *intention* * of the prisoner (*s*). The question, whether a particular taking was felonious, is a question of law, arising principally upon the intention of the prisoner, as found by the jury. The felonious quality consists in the *intention* of the prisoner to defraud the owner, and to apply the thing stolen to his own use (*t*). It is sufficient if the prisoner intend to appropri-

(*q*) See tit. *Accessory*.

(*r*) See tit. *Accessory*. East's P. C. 555. 1 Haw. c. 33, s. 8. 1 Hale's P. C. 507. 3 Inst. 108.

(*s*) East's P. C. 685. Summ. 61. 1 Hale's P. C. 504.

(*t*) *Vide supra*, 824. [*The State v. Smith*, 2 Tyler, 272.] See the case of *R. v. Morfit & Conway*, Cor. Abbott, J. Maidstone Lent Ass. 1816, and afterwards by the Judges. It was there held that the taking of oats by a servant, with intent to give them to the master's horses, from the granary of the master, by means of a false key, was a felony. See Burn's J. by Chetw. Vol. III. p. 176. So it was decided by Thompson, C. B. that the taking a horse by stealth from the stable of a prosecutor, and destroying it by throwing it down into a coal pit, in order to defeat a prosecution founded on a former larceny in stealing the same horse, amounted to a felony. But where the prisoner took the horses of the prosecutor with intent to ride them, and then to leave them without returning

(1) [If a person aid and abet in stealing goods in one county, and they be afterwards carried into another county without his assistance, where he is afterwards concerned in the possession and disposal of them, he is guilty of larceny in the latter county. *Commonwealth v. Dewitt*, 10 Mass. Rep. 154.

It is held in North Carolina and New York, that stealing property in another State, and bringing it there, is not there punishable as larceny. *The State v. Brown*, 1 Hayw. 100—*The People v. Gardner*, 2 Johns. 477. *The People v. Schenck*, *ibid.* 479. *Secus*, in Connecticut and Massachusetts. *The State v. Ellis*, 3 Conn. Rep. 185—*Commonwealth v. Cullins*, 1 Mass. Rep. 116. And a person receiving in Massachusetts goods stolen in another State, knowing them to be stolen, may be there punished as an accessory after the fact. *Commonwealth v. Andrews*, 2 Mass. Rep. 14.]

ate the value of the chattel, and not the chattel itself, to his own use ; as where the owner of goods steals them from his own servant or bailee, in order to charge him with the amount (*u*). The intention must exist at the time of the taking, and no subsequent felonious intention will render the previous taking felonious ; as, where goods are removed by the prisoner during a fire, with intent to preserve them for the owner, and he afterwards determines to appropriate them to his own use (*x*) ; or where a bailment is procured without any felonious intent on the part of the bailee, and he afterwards, and before the determination of the bailment, converts the property (*y*). The usual indication of a felonious intent is the secrecy and privacy with which the act is done, and the asserting a dominion over the property by the prisoner, or the actual * conversion of it, by sale or otherwise, to his own use. On the other hand, the inference of a felonious intent may be rebutted by evidence to prove that the taking was in joke ; was by mistake ; was accidental ; that the goods had been lost by the owner, and found by the prisoner (*z*) (1). * 828

The notoriety and openness of the taking, where possession has not been gained by force or by stratagem (*a*), is a strong circumstance to rebut the inference of a felonious intention (*b*) ; and it is a good defence to show that

them, it was held to be trespass only. *Dissentiente Grose*, and *dubitante* *Ld. Alvanley*, *R. v. Strong & Phillips*, 3 Burn, 177. 23d edit.

(*u*) 7 Hen. VI. f. 43. [Goulds. 186. pl. 128. per Gawdy, J.]

(*x*) *R. v. Leigh*, East's P. C. 694.

(*y*) *Infra*, 837. East's P. C. 594. 837.

(*z*) But even in this case the taking must have been *bona fide*, and not under a mere pretence of finding, although the property has been deposited in an unusual place, as in a hay-mow (2 East's P. C. 664. 1 Hale, 506. 2 Hale, 507) ; or has been left in a hackney coach by mistake (*Lamb's case*, East's P. C. 664. *Wynnes's case*, *ibid.* *Sears's case*, 1 Leach, 215, n.) ; or be found on the highway, if the prisoner knew the owner (*R. v. Walters*, 3 Burn's J. 180, 23d edit.) ; or be taken out of a bureau sent to be repaired. *Cartwright v. Green*, 8 Ves. 405.

(*a*) The mere doing it openly and by force does not excuse from felony. Kel. 82. T. Ray. 276. 2 Vent. 94. Kel. 43.

(*b*) It may be that the taking is no more than a trespass, and the circumstances in such case must guide the judgment ; as, where a man takes another's property openly before him or others, other-

(1) [The *bona fide* finder of lost goods cannot be held guilty of larceny by any subsequent act of his, in concealing or appropriating them to his own use. *The People v. Anderson*, 14 Johns. 294. *Sed vide* 2 Tyler, 379, *The State v. Jenkins*.]

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the taking was *bona fide* under process of law, or under a supposed claim of right, however unfounded such claim may be. The law has not deemed it to be so necessary to provide against an open and notorious invasion of property, for which the party may have his remedy against the known trespasser by a civil action, as against a taking accompanied with secrecy, or effected by force and terror, or by artifice. It is a question of fact, whether the goods were taken *bona fide*, under a claim of right, or with a roguish and felonious intent (c). Where the taking is obtained * by fraud or stratagem, it may amount to felony, although the owner consent to the act in ignorance of the prisoner's real intention ; and proof that the prisoner obtained possession of the property by means of stratagem and artifice is strong evidence of the felonious intent. It is, however, to be observed, that no intention will make the taking felonious where the owner *intends* to part with the *property altogether* to the prisoner ; in such case the party is liable to an indictment for obtaining the property by false pretences ; and this seems to be the strong test of distinction between a larceny, and an obtaining of money or goods by false pretences. If by means of a false pretence the prosecutor be induced to part with the temporary possession only, reserving a right of ownership, the prisoner, provided he intend to appropriate the property to his own use, is guilty of felony ; but if the owner be induced by the artifice to part with his whole interest, without any reservation, the defendant is guilty of a misdemeanour only (d).

3. In order to satisfy the allegation that the property was of the goods and chattels of the person specified, it must be proved, either that that person was the owner, (1) or

wise than by apparent robbery ; or having possessed himself of them, avows the fact before he is questioned. 1 Hale, 507. East's P. C. 661. See *R. v. Phillips & Strong*, 2 East's P. C. 662.

(c) 1 Hale, 507. 1 Haw. c. 33, s. 8. *Farr's case*, Kel. 43.

(d) *Supra*, 564 ; and *infra*, 837.

(1) [Bees are *feræ naturæ*, and although confined in the top of a tree by the owner of the tree, yet while they remain there and are not secured in a hive, they are not the subject of larceny. *Wallis v. Mease*, 3 Binney, 546. A mere letter is not a subject of larceny. *Payne v. The People*, 6 Johns. 103. Nor any thing which is destitute of both intrinsic and artificial value. *The State v. Bryant*, 2 Car. Law Repos. 269. Therefore an indictment was quashed, which charged the defendant with stealing "one half ten shilling bill, of the currency of the State." *Ibid*. And therefore, on an indictment for stealing a bank-note, it must be proved to have been genuine. *The State v. Tillery*, 1 Nott & M'Cord, 9. But a slave is

that he had the legal custody of the goods ; for the offence of larceny includes a trespass, to which possession is essential (c) (2) ; and therefore unless the person whose property is alleged to have been stolen be either actually or constructively in possession, the taking cannot amount to a larceny. But it is a general maxim, that the ownership of goods draws after it the possession ; and, therefore, it is sufficient to prove that the goods are the property of the party whose goods and chattels they are alleged to be in the indictment, although they were at the time in the actual * possession of some other person, as a servant or agent ; * 830 and so it is sufficient to prove that the goods were in the legal custody of the person alleged to be the owner in the indictment, who has the actual legal custody of the goods, as the agent or bailee of the actual owner. For such possession and interest are sufficient against a wrongdoer (d) (1). Where, however, the prisoner himself had possession of the goods delivered to him with the consent of the owner, a different consideration, as will presently be seen, arises ; and the question will be, whether the prisoner had a *bare charge* of the goods, the possession of which still remained in the owner, or he had acquired a legal possession of them as against the owner himself (e).

Of the party described (f).—In order to satisfy the allegation that the property stolen was of the goods and chat-

(c) 1 Haw. c. 33. Kel. 24. Dalt. 3. c. 101. East's P. C. 554. [See *The State v. M'Dowell*, 1 Hawks, 449.]

(d) See Stark. Criminal Pleadings.

(e) *Vid. infra*, 833, 4. And see *Campbell's case*, Leach, 942, 3d edit. where a prisoner decamped with a Bank note delivered to him by his landlady that he might change it, and held to be larceny. *R. v. Parker*, East's P. C. 671. *R. v. Nicholson & others*, East's P. C. 699. *Adam's case*, Russel, 1060. *Walsh's case*, 4 Taunt. 258. 284.

(f) As to variance in the description of the property or owner, see Stark. Crim. Plead. 2 Ed. 193. 201, 2.

the property of his master, and a subject of larceny. *Bryce v. The State*, 2 Overton's Rep. 254. *Plumpton v. Cook*, 2 Marsh. 451. *The State v. Hall*, 1 Taylor, 126.]

(2) [In *Pennsylvania v. Becomb & al.* Addison's Rep. 386, it is said that taking deer-skins, hung up in the woods at an Indian hunting camp, may be larceny, though the skins were not in the possession of any one at the time.]

(1) [The legal possession which a master has of his runaway slave is sufficient to warrant an indictment for stealing him from his master, after he has run away. *The State v. Miles*, 2 Nott & M'Cord, 1. *The State v. Davis*, 2 Car. Law. Repos. 291.]

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tels of *A. B.* as alleged in the indictment, it is sufficient to show that *A. B.* had the legal custody of the property, although the ownership resided in another (*e*) (2); as where the goods are stolen from a servant in the absence of the master. For every larceny includes a trespass, which is an injury to the possession; and therefore it seems that where property has been lost by the owner and found by the prisoner, the taking cannot be felonious, since no one was in possession (*f*).

- * 831 * In *Phipoe's* case (*g*) it was held that the taking was not felonious, since the note had never been for a moment in the peaceable possession of the prosecutor. But it is a general rule of law, that the right of property draws after it the possession (*h*); therefore it is sufficient to prove the ownership according to the allegation in the indictment, although the alleged owner never had the actual possession; and in general the possession of an agent is the possession of the principal, with respect to third persons, even although the agent or bailee be not responsible to the principal for the loss of the goods (*i*). But as between the owner and a bailee, the possession of the latter is not necessarily the possession of the former, as will afterwards be seen.* It is a consequence from the general principle that a joint-tenant, or tenant in common, cannot be guilty of larceny in respect of the joint property, since he has a right to the possession (*k*). So where the wife delivers possession of the husband's goods, the person taking them upon such delivery is not guilty of larceny, since she has an interest in the goods (*l*); but it is otherwise where the goods are

(*e*) See the cases, *Stark. Crim. Pleadings*, 2 Ed. 201, 2.

(*f*) 1 *Haw. c.* 33. 3 *Inst.* 102. 1 *Hale*, P. C. 504. *East's P. C.* 25. 554; but see above, 828, note (*z*). [See *The State v. Braden*, 2 *Overton's Rep.* 68.]

(*g*) *Leach*, C. C. L. 3d edit. 774.

(*h*) See the *dictum* of *Gould*, J. *East's P. C.* 674.

(*i*) *Stark. Crim. Pl.* 2 Ed. 203.

(*k*) 1 *Hale's P. C.* 513. *East's P. C.* 558.

(*l*) 1 *Haw. c.* 33. s. 19. *Harrison's case*, *Leach*, 56. *East's P. C.* 559.

(2) [In Massachusetts, evidence that the person, whose the chattels described in an indictment for larceny are alleged to be, is mere bailee of an officer who had attached them—having engaged to redeliver them on demand—will not support the indictment; as he is a mere servant of the officer and has no property in the chattels. *Commonwealth v. Morse*, 14 *Mass. Rep.* 217. See *vide* 1 *N. Hamp. Rep.* 289, *Poole v. Symonds*.]

obtained by force or fraud from the wife (*m*). The property is not altered by a *tort*; and therefore if *B.* steal the goods of *A.*, and *C.* steal the same from *B.* the property still remains in *A.*, and may be so described (*n*). So if *B.* * receive goods from the sheriff under a *tortious* reple- * 832
vin (*o*).

PART
IV.

Ownership.

Every larceny includes a trespass, and is an injury against the possession of the owner; and therefore in general a bailee who has possession of the goods under a contract cannot be guilty of felony in stealing them so long as the contract continues undetermined. As where a tailor is intrusted with cloth, or a carrier with goods, to be carried, or a goldsmith with plate (*p*), or a weaver delivers materials to workmen out of the house to be woven (*q*). In such and all other cases where the party has a legal possession of the property distinct from that of the owner, he is not guilty of felony in appropriating the goods, unless indeed, as will afterwards be seen, the possession be obtained by fraud, and with a felonious intent to steal the goods, for then the party acquires no legal possession as against the owner, for the law will not permit him to take advantage of his own wrong; and in point of law no contract exists.

Bailment,
where existing.

Where a person has a legal possession of the goods distinct from that of the owner, he cannot be guilty of felony so long as the legal possession subsists; and therefore, where such distinct possession has been given, further evidence is essential to answer or rebut the inference of a legal possession by the prisoner. But it is to be observed, that to render this necessary, the possession must be *distinct* from that of the owner, for if the party have but a *bare charge* of the goods under the immediate control and superintendence of the owner, without any possession distinct from that of the owner, he may be guilty of larceny in taking the goods, notwithstanding * his manual tenure of * 833 them, and therefore a servant is guilty of felony in stealing his master's goods, although he has the custody of them

Proof to defeat
a bailment.

(*m*) 1 Hale's P. C. 514. East's P. C. 558. St. West. 2 c. 34.

(*n*) 1 Haw. c. 33. 3 Inst. 102. 1 Hale's P. C. 504. 13 Ed. 4. 9, 10.

(*o*) 1 Hale's P. C. 507. 3 Inst. 108. Kel. 43. 1 Sid. 254. T. Raym. 276.

(*p*) East's P. C. 693.

(*q*) But see 1 Haw. c. 33, s. 56.

PART
IV.Bailment
where existing.
Servant.

for a particular purpose (*r*). As where a butler steals his master's plate (*s*) (1). Even though the servant has the goods for a specific purpose, as where money had been delivered to a servant to be delivered to a third person, and he spent part, and embezzled the rest (*t*).

Where a servant received money from his master to buy licenses with, which he embezzled, it was held that he was not guilty of felony (*u*) at common law. But this was denied in *Lavender's* case (*x*).

There the money had been delivered by the master to the prisoner to be taken to one *Flawn*, as the consideration for bills to be given for the money in a few days (*y*), and the prisoner instead of delivering the money spent part, and embezzled the remainder, and it was held to be larceny.

* 834 * So where a carter went away with his master's cart, it was held that he was guilty of felony (*z*).

(*r*) [*The State v. White*, 2 Tyler, 352.] E. P. C. 554. 1 Hale, 506. 1 Haw. c. 33. See the stat. 21 Hen. VIII. c. 7, which makes it felony in servants, not being apprentices, to withdraw themselves, and go away with caskets, &c. delivered to them by their masters, to keep, with intent to steal the same, &c.; or to embezzle the same, or convert the same to their own use with the like purpose, if the said caskets, &c. be of the value of 40s. To bring a case within this statute it must appear that the servant was such, both at the time of the delivery and of the stealing. (1 Haw. c. 33, s. 12. 2 East's P. C. 562); and it must be proved that the goods were kept for the purpose of being returned. *Watson's* case, East's P. C. 562.

(*s*) East's P. C. 564.

(*t*) *R. v. Lavender*, East's P. C. 566.

(*u*) *Watson's* case, East's P. C. 562.

(*x*) East's P. C. 566.

(*y*) A distinction was taken between the case where the prisoner receives money to be delivered specifically to another, and where it is not to be so delivered; but Buller, J. denied the distinction, which certainly appears to be a very subtle one, and adhered to the case of *R. v. Paradise*, cited *R. v. Wilkins*, 2 Leach, 591, as good law. In this case, the prisoner having received several bills from his master by whom he was employed as book-keeper, to be transmitted from Devizes by the post, to the prosecutor's banker in London, went to Salisbury and indorsed one of the bills, and got cash for it; and all the Judges (except Ld. Camden, who was absent,) held it to be larceny; on the ground that the possession still continued in the master. East's P. C. 565.

(*z*) *Robinson's* case, East's P. C. 565.

(1) [Or a hostler his master's horse. *The State v. Self*, 1 Bay, 242.]

Where a porter was sent by his master with goods to be delivered to a customer, and he broke open the parcel and sold them, it was held to be felony (a).

PART
IV.

But although it is clear that in general a servant has nothing more than a bare charge of his master's goods, and that the possession of the servant is the possession of the master, it has been doubted whether, when a servant or clerk had received the possession of the goods by delivery to him for his master, and the master never had any other possession than such possession by the servant or clerk, the latter was guilty of felony in stealing the goods (b). But the statute 39 Geo. III. c. 85, which recites that doubts had been entertained on the subject, removes them (c).

Bailment
where existing.
Servant.

In *Sheares's* case (d) where the servant received oats into his master's barge, and afterwards separated five sacks from the rest, and carried them away, it was held * to be as much a felony as if he had taken the oats from * 835 his master's granary. So in *Abraham's* case (e), the prosecutor having purchased corn which was on board a vessel in the Thames, sent the prisoner, who was his servant, and who had for many years been employed by him in superintending the unloading of vessels in the Thames, to receive it into the prosecutor's barge, whilst the corn-meters were unloading the corn, from the Dutch vessel where it lay, into the prosecutor's barge; the prisoner came alongside in a boat, and requested that two empty sacks, which he handed on board the Dutch vessel, might be filled with oats, and desired that these might be added to the score, and not placed to a separate account, and took away the sacks so filled, and sold them, and the judges held that he was guilty of larceny. Where the owner has never had

(a) *R. v. Bass*, Leach, 285. See Kel. 35. *Vale v. Bayle*, Cowp. 294.

(b) Lord Hale held, that if a servant went with a bond to receive money, which he embezzled, he was not guilty of felony at common law, because the bond was delivered to him by the master; nor under the statute, because the money was not delivered to him by the master. Hale, 668. See *Waite's* case, East's P. C. 570. *R. v. Bazely*, East's P. C. 571. *R. v. Bull*, cited Leach, 960. But see *R. v. Sheares*, East's P. C. 568, & *infra*, 842.

(c) *Vid. infra*, 842.

(d) East's P. C. 568.

(e) East's P. C. 569. Leach, 960. See *R. v. Meeres*, 1 Show. 50. Gouldsb. 186. Where a servant employed to sell goods for his master, received 160 guineas, and concealed some of them in his own chamber, and broke open the house at night to steal them, it was held to be no burglary, since he had possession of the money.

PART
IV.Bailment,
where existing.
Servant.

* 836

any possession of the money or goods, except by an agent, who is not a clerk or servant, the appropriation by the agent is not a felony. Thus where the prisoner received a draft from his employer with a felonious intention to embezzle part of the proceeds, but applied the draft itself according to the intention of his principal, by receiving the amount from the banker of the principal, but afterwards, instead of applying the amount in the purchase of American stock, according to the direction of his principal, appropriated part of the proceeds (*e*), he was not (it was held) guilty of stealing the draft, because he had applied the draft itself according to the intention of the principal; nor of stealing the produce of the draft, since the principal * never had any possession of that, as distinct from the possession of the agent.

In general, where the party has a bare charge of the goods, or the use of them, subject to the immediate control and dominion of the master, the possession still remains in the latter; as, where a guest uses plate in the owner's house (*f*), a weaver delivers goods to his journeymen to be worked up in the house (*g*), or where a banker's clerk has access to the money-drawer for a special purpose (*h*). So goods, which remain in the presence of the owner, remain in his possession, although actually delivered to another (*i*), as to a servant, or to a porter to be carried. Where a banker's clerk took notes from the till, under colour of a cheque from a third person, which cheque he had obtained by having entered a fictitious balance in the books, in favour of that person, it was held that he was guilty of felony; the fraudulent obtaining of the cheque being nothing more than mere machinery to effect his purpose (*k*).

Bailment.
Precedent.
Felonious intent.

Where the defendant has a *prima facie* legal custody of the goods, as distinct from that of the owner, with his consent, the presumption may be rebutted, 1st, By proof that the prisoner originally obtained that possession with a felonious intention, by fraud, threats, or duress; for the law

(*e*) *R. v. Walsh*, 4 Taunt. 258.(*f*) *East's P. C.* 554.(*g*) *Ibid.*(*h*) *R. v. Murray*, *East's P. C.* 683. *Bazely's case*, *East's P. C.* 571.(*i*) *East's P. C.* 682. 684. See *Chisser's case*, *East's P. C.* 677, 683. *Atkinson's case*, *Leach*, 339. 1 *Hale*, 585. *Campbell's case*, *supra*, 830.(*k*) *R. v. Hammon*, 4 Taunt. 304.

will not permit him to avail himself of his own fraud, and to set up as a defence a delivery by contract or consent, which was procured by stratagem and deceit, in order to achieve the offence.

PART
IV.

* 2dly, By proof that the privity of contract had been determined by the wrongful act of the bailee; or, 3dly, That it had been determined according to the original intent of the parties.

Bailment.
* 837

1st. By proof of a precedent felonious intention, or that the possession was obtained by fraud or duress. As where the prisoner hired a horse from the owner with intent to steal it (*l*) (1). So where the prisoner, intending to steal the mail-bags from a post-office, procured them to be let down to him by a string from the window of the post-office, under pretence that he was the mail-guard (*m*). So, although the general rule of law be, that the taking must be *invito domino*, according to the maxim, "*volenti non fit injuria*," yet if the owner consent from fear, under a reasonable apprehension of violence, the taking will be felonious (*n*); as where a woman gives money to preserve her chastity (*o*); for in such cases, where the party is not a free agent, but parts with property from fear and terror, there is no consent. But if the taking be by *procurement* of the owner, the maxim applies, and it is no larceny (*p*). But it is otherwise where the owner merely *facilitates* the execution of a felonious intent, as by placing himself in the way of robbers (*q*); or by allowing his servant to act the part of an accomplice (*r*).

Precedent.
Felonious intent.

2dly. That the privity of contract had been determined by the precedent wrongful act of the bailee. After the determination of the special contract, by any * plain and unequivocal wrongful act of the bailee, inconsistent with that contract, the property, as against the bailee, reverts in the owner, although the actual possession remain in the

Determination
by tort.
* 838

(*l*) *R. v. Munday*, East's P. C. 594, *Major Semple's case*.

(*m*) *R. v. Noah Pearce*, East's P. C. 603.

(*n*) East's P. C. 74, *Blackham's case*. East's P. C. 555. 1 Hale, 533. East's P. C. 665. [See *Dodd v. Hamilton*, 2 Taylor, 31.]

(*o*) *Blackham's case*, East's P. C. 711. 555.

(*p*) *R. v. Mac Daniel & others*, Fost. Dis. 121. 4 Bl. Comm. 230. East's P. C. 665. *R. v. Eggington & others*, East's P. C. 666.

(*q*) *Norden's case*, Fost. 129. East's P. C. 666. *Infra*, 842.

(*r*) *R. v. Eggington & others*, East's P. C. 666. [See 2 Taylor, 44.]

(1) [S. P. *The State v. Self*, 1 Bay, 242. *The State v. Gorman*, 2 Nott & M'Cord, 90. *The State v. Barna*, 2 Taylor, 44.]

**PART
IV.**

**Bailment.
Determination
by tort.**

bailee (s). If a carrier break open a box delivered to him for the purpose of carriage, and steal part of the contents, he is guilty of felony, for the breaking open the box is clear and unequivocal evidence of his determination of the bailment; and the privity of contract being thus determined, it can no longer affect the question as to the commission of a felony in taking the goods (t); but if the carrier should, contrary to his duty, sell the whole package intrusted to him, without any previous breaking, or other act, sufficient to determine the privity of contract, he would not be guilty of felony (u) (1).

Where the prosecutor sent forty bags of wheat to the prisoner, a warehouseman and wharfinger, for safe custody, until they should be sold by the prosecutor, and the prisoner's servant, by the direction of the prisoner, emptied four of the bags, and mixed their contents with other inferior wheat, and part of the mixture was disposed of by the prisoner, and the remainder was placed in the prosecutor's bags which had thus been emptied, and there was no severing of any part of the wheat in any one bag with intent to embezzle that part only which was so severed, it was held that the prisoner was guilty of larceny in taking the wheat out of the bag (x) (2).

(s) Per Gould, *J. Charwood's case*, East's P. C. 691. *Townsend's case*, East's P. C. 627; 13 Ed. 4. 9.

(t) 1 Hale, 504. 1 Haw. c. 33, s. 5. 7. 3 Inst. 107. East's P. C. 695.

(u) Ibid. See the next note.

(x) *R. v. Brazier*, Cor. Holroyd, J. Nottingham Summ. Ass. 1811, and afterwards by eleven of the judges. This distinction, which has constantly been recognized, although both its soundness has been doubted, and its principle disputed, seems to be a natural and necessary consequence of those simple principles upon which this branch of the law rests; and although it may at first sight appear somewhat paradoxical and unreasonable, that a man should be less

(1) [If a load of goods, consisting of several packages, be delivered to a carrier to be transported to a specified place, and he fraudulently take away one of the packages and convert it to his own use before they arrive at the place of destination, it is larceny. *Commonwealth v. Brown*, 4 Mass. Rep. 580. So if the servant, employed by a carrier to drive his team to a certain place, drive to another place, and fraudulently take and convert the load to his own use. *ibid.* *Dame v. Baldwin*, 8 Mass. Rep. 518.]

(2) [If a miller, having received an article to grind, fraudulently separate a part of it from the rest, for his own use, the contract of bailment is thereby determined, and the conversion to his own use of the part so separated, *animo furandi*, is larceny. *Commonwealth v. James*, 1 Pick. 375.]

* 3dly, or lastly, it may be shown that the bailment had been determined according to the intention of the parties ; as, that a package delivered to a carrier had reached the place of destination (y).

PART
IV.

* Two cannot be convicted upon an indictment charging a joint larceny, unless there be evidence to satisfy the jury that they were concerned in a joint taking (z).

Bailment.

* 840

Variance.

guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be well warranted, when it is considered how necessary it is to preserve the limits which separate the offence of larceny from a mere breach of trust, as clear and definite as the near and proximate natures of these offences will permit ; and that the distinction results from a strict application of those rules which distinguish those offences. If the carrier were guilty of felony in selling the whole package, so would every other bailee or trustee, and the offence of larceny would be confounded with that of a mere breach of trust, and indefinitely extended. On the other hand, in taking part of the goods after he has determined the privity of contract, the case comes within the simple definition of larceny, for there is a felonious caption and asportation of the goods of another, which stands totally clear of any bailment. It is true that the sale and delivery of the whole package by the carrier being inconsistent with the object of the bailment, determines the privity of contract ; but then the question arises, what caption and asportation constitute the larceny, for these are in all cases essential to the offence. A mere intention on the part of the carrier to convert the goods, unaccompanied by any overt act, whereby he disaffirms the contract, is insufficient ; and the act of conversion itself, such as the delivery of the whole of the entire package to a purchaser, is insufficient, because it is merely contemporaneous with the extinction of the privity of contract, which is not determined, except by the conversion itself ; but if the package be first broken, and by that overt act the contract be determined, a subsequent caption and asportation, either of part, or as it seems, of the whole of the goods, is a complete larceny within the definition, unaffected by any bailment. This distinction is explained by Lord Hale upon the principle above stated. Hale, 504, 5. East's P. C. 697. Kelyng, C. J. explains it on the ground of a presumed previous felonious intention on the part of the carrier, when he first took the goods ; but this is not satisfactory, since the same presumption would arise when the carrier disposed of the whole of the package. For further illustrations of this doctrine see the *Miller's case*, East's P. C. 698. The *Porter's case*, East's P. C. 697. *Wynne's case*, East's P. C. 664. *Case of Sears and Bass*, East's P. C. 664. Leach, 285.

(y) 1 Hale, 504, 5.

(z) *Hempstead and Hudson* were indicted jointly for stealing cutlery to the amount of 40s. in a dwelling-house. The two prisoners were in the employment of the prosecutor, a cutler, as porters ; cutlery was found on the person of Hempstead to the amount of 6l., and similar cutlery on the person of Hudson to the value of 6s. only, each confessed that the property in his possession belonged to his master ; and the jury were of opinion, that although the prisoners were in the same room together (from which the property

PART
IV.Presumptive
evidence.

As the caption and asportation can seldom be directly proved by an eye-witness, presumptive evidence must in general be resorted to. The most usual and cogent evidence of this nature consists in proof of the prisoner's *possession* of the stolen goods (1). The force of this presumption depends upon the consideration that the prisoner who *can* account for his possession of the goods, will, if that possession be an honest one, give a satisfactory account of it.

The effect of this evidence, is to throw upon the prisoner the burthen of accounting for that possession, and in default to raise a presumption that he took the goods. Evidence of this nature is by no means conclusive, and it is stronger or weaker as the possession is more or less recent, for the obvious reason, that the difficulty of accounting for the possession is increased by the length of time which has elapsed during which the goods may have passed through many hands. The rule is, that *recent possession* raises a reasonable presumption against the prisoner (z). Where a letter, containing two bank-notes, was put into the post-office on the 17th of April, proof * that a person employed in the post-office had the notes in his possession on the 21st of April was held to be sufficient to warrant a conviction under the stat. 7 G. 3. c. 50, for secreting the letter (a). Unless the possession be recent, it is necessary to give strict proof of the identity of the goods, which is not so requisite where the possession is *very recent*; as, where a man comes out of a barn with corn concealed upon his person (b); or where he is in possession of sugar which he cannot account for, just after he has left the dock, where a quantity of similar sugar is deposited (c). The having property of this nature in possession, without being able to account for it, is in some instances made a substantive offence, by local acts made for the protection

* 841
Possession.

had been stolen,) yet that there was not sufficient evidence to prove that they had acted in conjunction. Both were found guilty; but the judges were of opinion, that after Hudson had received a pardon, sentence might be passed upon Hempstead. O. B. Feb. Sessions, 1817.

(z) East's P. C. 657. It is also to be carefully observed, that the mere finding of stolen goods in the house of the prisoner, where there are other inmates of the house capable of stealing the property, is insufficient evidence to prove a *possession* by the prisoner.

(a) Ibid.

(b) Ibid.

(c) Ibid.

(1) [*Pennsylvania v. Myers*, Addison's Rep. 320. *The State v. Jenkins*, 2 Tyler, 379.]

of property much exposed, and which it is difficult to identify.

PART
IV.

In other cases it seems that mere evidence of the possession of property by the prisoner, for which he cannot account, without evidence to *identify* it with that proved to have been stolen, is insufficient (*d*). And a prisoner ought not to be convicted of stealing the goods of a person unknown, upon such evidence, without proof that a felony has actually been committed (*e*). The fact of possession is capable of being confirmed or weakened by circumstances, particularly those of his concealment of the goods, the opportunity which the prisoner had to commit the crime; his vicinity to the place; his conduct when the charge was made; false or improbable representations to account for the possession; his readiness or unwillingness to meet the charge.

Presumptive,
evidence.

* Under an indictment on the stat. 39 G. 3, c. 85, the prosecutor must prove (*f*), 1st, That the defendant was his *servant* or *clerk* (*g*); 2dly, That he *received* the goods or monies specified; 3dly, On account of his master; 4thly, That he *embezzled* them.

* 842
Embezzle-
ment.

The goods or money specified.—This proof requires, it seems, the same particularity as upon an indictment for larceny. Upon a charge of embezzling so many pounds, it is not sufficient to prove an embezzling of the same number of bank-notes to the same amount (*h*). Upon a charge of embezzling the sum of 1*l.* 11*s.* it was held to be insuffi-

(*d*) East's P. C. 657. 2 Hale's P. C. 290.

(*e*) 2 Hale's P. C. 290. 4 Bl. Comm. 352; Where the owner might easily have been ascertained, an indictment for stealing the goods of a person unknown was held not to be maintainable. *R. v. Robinson*, Cor. Richards, C. B. Durham, 1817.

(*f*) See *Ld. Ellenborough's* observations, *R. v. Johnson*, 3 M. & S. 548.

(*g*) See *R. v. Squire*, 2 Starkie's C. 349. The statute is not confined to clerks and servants in trade. A person employed as clerk by the overseers of Leeds was held to be within the statute. (2 Starkie's C. 349.) The statute applies to female as well as to male servants. *R. v. Smith*, by the Judges. 3 Burns, J. by Chetw. 89. Where a traveller is employed by several houses to receive money, he is a servant of each, per Bayley, J. Lancaster Summer Assizes, 1821.

(*h*) *R. v. Lindsey*, 3 Burns, by Chetw. 189. *R. v. Furneaux*, *ibid.* But an indictment was held to be good, which alleged a receiving of 9*l.* 18*s.* 9*d.* without showing how the same was made up. *R. v. Crighton*, Summer Ass. 1803, by all the Judges. 3 Burn. by Chetw. 190.

PART
IV.

cient to prove that so much was paid, the party who paid it being unable to state in what way it was paid (i).

3dly, On account of his master.—It is not sufficient under this statute to prove a delivery to the servant by the master himself (k); but it is sufficient if he receive the money from a customer, although it was given by the master to the customer, in order to try the servant's honesty (l).

* 843
Proof of em-
bezzlement.

* 4thly, *The Embezzlement*.—It is not sufficient, in support of a charge of this nature, to prove a general deficiency to the amount stated, upon a balance of account, without fixing upon some particular sum of money which has been received by the prisoner, and evidence to show that he has embezzled it. Evidence of this nature generally consists in showing that the prisoner omitted to make the usual entry of the receipt of the money in the book or account in which it ought to have been entered (j); in his using artifice and practices to prevent a discovery of the deficiency, or his denial of the receipt of the particular sum (m).

Where a prisoner, having received money in Surrey, denied the receipt of it that same day to his master in Middlesex, and there was no evidence to show an embezzlement in Surrey; the Judges held that the offence was committed in the county of Middlesex (n). Where the prisoner received money in the county of Salop, and denied the receipt in the county of Stafford, it was held to be evidence to show that the original receipt was with intent to embezzle, and that the prisoner was properly tried in the county of Salop (o).

Accessories.

Upon an indictment against one as an accessory in receiving stolen goods, it must be proved that the goods were

(i) *R. v. Furneux*, O. B. Sept. 1818, Cor. the Recorder, and afterwards by the Judges. 3 Burns Just. by Chetwynd, 189.

(k) *Peck's case*, Cor. Park, J. Staffordshire Summer Ass. 1817.

(l) *R. v. Whittingham*, 2 Leach, 912. *Headger's case*, Leach, 1033. See *Bull's case*, cited in *Bazely's case*, 2 Leach, 841. *R. v. Foot, Bridg.* Summer Ass. 1818, Cor. Graham, B. and afterwards by the Judges.

(j) See *R. v. Squire*, 2 Starkie's C. 349.

(m) *R. v. Hobson*, East's P. C. Add. xxiv. 2 Russell, 1238. *Taylor's case*, 3 B. & P. 596. 2 Leach, 974.

(n) *Taylor's case*, 3 B. & P. 596. The prisoner in that case returned into the county of Middlesex soon after receiving the money, and probably had possession of the money in Middlesex, and qu. whether it is not necessary that the prisoner should have had possession of the money or goods in the county in which he is indicted, as in case of a common larceny.

(o) *R. v. Hobson*, East's P. C. Add. xxiv.

of the value of 12*d.* (*p*). Where the indictment alleged against an accessory to a felony, that * the principal felon was *unknown*, proof that the principal was known, and that he had given evidence before the Grand Jury, was * 844 held to defeat the indictment (*q*); and where the prisoner was indicted for a misdemeanour in receiving stolen goods, and it appeared that the principal had been convicted at the same assizes, the Court directed an acquittal (*r*). The buying goods at an undervalue affords some presumption that the buyer knew that they were stolen (*s*), and this is stronger or weaker in proportion to the inferiority of price (1).

LIBEL AND SLANDER.

THE evidence is either, I. In a civil action; or, II. A criminal prosecution. In the case of a civil action are to be considered,

- 1st. *The proof of publication*, p. 844.
- 2dly. *Of the prefatory averments and innuendoes*, p. 859.
- 3dly. *Of malice*, p. 862.
- 4thly. *Of damage*, p. 871.
- 5thly. *Of evidence in defence* p. 873.—*Justification*; p. 878; *Mitigation, &c.* p. 877.

First, as to the fact of publication.—Where the action is for words spoken, evidence of the speaking before any third

Proof of publication.

(*p*) *R. v. Avery & Evans*, Fost. 73. 1 Hale, 616. [See *The State v. Goode*, 1 Hawks, 463.]

(*q*) *R. v. Walker*, Cor. Le Blanc, Gloucester Summer Ass. 1812. 3 Camp. 264. [See *The State v. Groff*, 1 Murphey, 270.]

(*r*) Lancaster Lent Ass. 1813. Cor. Thompson, B. Stark. Crim. Pl. Prec. 123. Where the indictment alleged that certain persons unknown committed a burglary, and that the prisoner received the goods, &c. and it appeared that an indictment had been found the same assizes, charging *A. B.* as the principal, and the prisoner as accessory to the same robbery, ten of the Judges were of opinion that the prisoner ought to be acquitted. *R. v. Bush*, Cor. Garrow, B. Gloster Summ. Assizes, 1818.

(*s*) 1 Hale, 619.

(1) [Where a person suffered a trunk containing stolen goods to be put on board a vessel in which he had taken his passage, as part of his baggage, it was held that he was well convicted of receiving stolen goods. *The State v. Scovel*, 1 Rep. Con. Ct. 274.]

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cation.

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person will be sufficient, although the declaration allege them to have been spoken before *A. B.* and others (*t*).

Where a witness having heard scandalous words spoken has committed them immediately to writing, * he may afterwards read the paper in evidence, if he swear that the words contained in it are the very words (*u*), and if the words have not been written immediately, the witness may refer to his minutes to refresh his memory (*x*). It is not sufficient for the witness to swear that the defendant uttered those words, or words to the like effect, for the Court must know the very words, in order to judge of their effect (*y*).

If the words have been spoken, or libel has been published, in a foreign language, or in characters not understood by those who read or see them, there is no publication, since there is no communication prejudicial to the plaintiff; and if the words have been spoken, or the libel has been addressed to the plaintiff only, without further publication, no action is maintainable, since no temporal damage can have accrued from the defendant's act (*z*); but such a publication of a libel would be sufficient to sustain an indictment, on the ground of its tendency to produce a breach of the peace.

The general rule seems to be, that some of the words must be proved as they are laid in the declaration (*a*). The rule as to the proof of words spoken is not so strict as in the case of libel, where the whole must be proved as laid, for it is considered to be one entire thing, and a variance as to any part destroys the identity of the whole (*b*). The same strictness (perhaps * on the ground of convenience) does not apply in actions for words; for if some of those, being actionable, be proved, an omission to prove the remainder of the words laid in context with them, or a variance from the latter, will not be material, provided the

Variance.

(*t*) B. N. P. 5.

(*u*) Per Holt, *C. J. Sandwell v. Sandwell*, Holt, 295.

(*x*) Ibid. *supra*, Vol. I. p. 128.

(*y*) Fost. 200. *Hussey v. Cooke*, Hob. 294; 1 Hale, 111. 115. 323; Kel. 14; 2 Haw. c. 46.

(*z*) 1 Will. Saun. 132. n. 2. 2 Esp. C. 625. [*Lyle v. Clason*, 1 Caines' Rep. 581.] And even in the case of an indictment for a libel, confined to reflections upon the professional character of the prosecutor, there being no allegation of an intention to provoke him to commit a breach of the peace, is insufficient, unless there be a publication to a third person. *R. v. Wegener*, 2 Starkie's C. 245. [See Godb. 340.]

(*a*) 2 East, 434; 8 T. R. 150.

(*b*) *Infra*. 858. and *infra*. tit. *Variance*.

words proved do not (b) differ in sense from those alleged, considering the whole context; and the rule is the same, where the plaintiff declares of fewer words than were spoken (c). And provided the sense be kept entire, it seems that even partial grammatical variances in the construction of sentences will not be material (1). But proof of words spoken interrogatively will not support an allegation of words spoken affirmatively (d). Evi-

Proof of the
words.

(b) The plaintiff declared that the defendant said of him "He is a maintainer of thieves, and a strong thief." The Jury found the whole to have been said, except the word *strong*, and it was adjudged for the plaintiff, (*Burgis's case*, Dyer, 75.) In *Sir J. Sydenham's case*, Cro. Jac. 407, an action was brought for the words, "If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the King too; and he is a maintainer of papistry and rebellious persons." The Jury found that he spoke the words, "*I think in my conscience, if Sir John Sydenham might,*" &c. finding all the remaining words verbatim. This case underwent much discussion. Three of the Justices of the King's Bench held that the plaintiff was entitled to judgment, since the additional words proved were not words of extenuation, or alteration of the sense of the former words, but rather enforced them; and upon a writ of error brought, the judgment was affirmed by the opinion of Tanfield, C. B. Warburton, Bromley and Hutton, against that of Hobart, C. J. of C. B. Winch and Denman; and see 12 Vin. Ab. 68, and *infra*, note (e).

(c) See the preceding note (a). [*Genet v. Mitchell*, 7 Johns. 120.]

(d) 2 East. 434; 8 T. R. 150; 4 T. R. 217.

(1) [It is sufficient to prove the substance of the words—but the sense as well as manner of speaking them must be the same as averred. *Miller v. Miller*, 8 Johns. 74. *Kennedy v. Lowry*, 1 Binney, 393. *Brown v. Lamberton*, 2 ib. 34. *Hersh v. Ringwalt*, 3 Yeates, 508. *Grubbs v. Kyzer*, 2 M'Cord, 305.]

A declaration in slander, charging that the defendant spoke of the plaintiff, "*in substance, the following false, scandalous and defamatory words*"—is good. *Kennedy v. Lowry*, ubi sup. So a declaration, laying the charge in the alternative, viz. that the defendant spoke certain words (which are set forth), "*or words of the same import,*" is good after verdict. *Bell v. Bugg*, 4 Munf. 260.

If the words laid are, that the plaintiff stole the goods of A., proof of the defendant's saying that the plaintiff stole the goods of B., will not support the declaration. *Johnson v. Tait*, 6 Binney, 121. A declaration alleging that the defendant said "*there was a collusion between A., B., C. and D., to make E. swear a false oath,*" &c. is not supported by proof of his having said "*there was a collusion between A., B. and C., to make E. swear,*" &c. *ibid.* Where the declaration alleged the words to have been spoken of and concerning the evidence given by the plaintiff on a complaint made by him before a justice of the peace, on the 20th of March, and the proof was that the complaint was made on the 8th of March, the variance was held to be immaterial. *M'Kinly v. Rob*, 20 Johns. 351. *S. P. Chapman v. Smith*, 13 Johns. 78.]

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Proof of publication.

The writing (*o*) or even printing (*p*) a libel, does not, however, in any case, amount to a publication, but is mere evidence from which it may be inferred; whether there has been any publication is usually a question of fact, falling within the province of the jury to decide (*q*); and though proof that the libel is in the hand-writing of the party goes far in fixing him with the publication, he is still at liberty to rebut the strong presumption thus raised against him, by reconciling the fact with his own innocence.

* 850 * The sending a letter to a third person is a sufficient publication (*r*).

A consent by the master to the act of the servant in printing a libel, is *prima facie* evidence of a publication by the master (*s*).

An allegation that the defendant published the libel is satisfied by proof that it was published by his agent (*t*), if an authority from the principal to the agent can be proved. And although an authority to commit an unlawful act will not in general be presumed, yet it is otherwise in the case of booksellers and others, where the book or libel is purchased from an agent in the usual course of trade (*u*) (1).

libel, is no more than the possession of a man's thoughts. (See *Entick v. Carrington*, 11 St. Tr. 321.) But where the libel has been published, then the possession is evidence that the defendant was the publisher. (*R. v. Beere*, ubi sup.) The possession of a libel in the defendant's house or shop is evidence of a printing and publishing there. (12 Vin. Ab. 229; 4 Read, St. Law, 155; Dig. L. L. 22.) If a libel be stolen, that is no publication, (*Barrow v. Le-wellin*, Hob. 62.) but if a single copy reach a single person in consequence of an intent to publish, it is sufficient. *Ibid.*

(*o*) *Lamb's case*, 9 Co. 59, 15 Vin. Ab. 91.

(*p*) *Baldwin v. Elphinstone*, 2 Bl. R. 1037, where the printing of a libel in a newspaper was intended by the court to be a publication.

(*q*) *Baldwin v. Elphinstone*, 2 Bl. R. 1037. *R. v. Bardett*, 4 B. & A. 95—184. 314.

(*r*) Rast. Ent. tit. *Actions sur le Case*, 3, a; 1 Ld. Raym. 341. 417. 486. [*Lyle v. Clason*, 1 Caines' Rep. 581.]

(*s*) *R. v. Harris*, 2 St. Tr. 1039. See Ld. Camden's observations in *Entick v. Carrington*, 11 St. Tr. 322.

(*t*) *Supra*, tit. *Agent*; and Hale, P. C. 613.

(*u*) Bac. Ab. tit. *Libel*, 458. The publication of a newspaper is sufficiently proved by a witness who states it to have been published in the usual way, without producing a copy which has actually been published. *R. v. Pearce*, Peake's C. 75. Cor. Lord Kenyon; and such copy need not bear a stamp. *Ibid.*

(1) [An action for a libel lies against the proprietor of a gazette

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By an agent.

The sale by an agent in a shop in the usual course of business is *prima facie* evidence of a publication with the knowledge and privity of the owner; and although it be not conclusive evidence, yet it throws upon him the necessity of rebutting the presumption by evidence to the contrary (*x*), even although the principal lives at a distance from his shop (*y*). But the * defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely; that by reason of sickness he was ignorant of the fact; or that he was absent under circumstances which do not import fraud (*t*). The imprisonment of the defendant at the time of publication is evidence in exculpation, but not conclusive; it may be rebutted by proof of the access of agents (*u*).

Where in an action for a libel it appeared that the libel was written in the hand of the daughter of the defendant (a minor), who usually wrote his letters of business, but no evidence was given of any authority to write the letter in question, or of any recognition of the letter by him, it was held that there was no evidence to go to the jury of a publication by the defendant, since this was not an act within the scope of the defendant's authority (*a*).

If one procure another to publish a libel, the procurer is guilty of a publication, wherever it takes place, and the actual publisher, like any other *particeps criminis*, is competent to prove his employment by the defendant, and the consequent publication (*b*). And if a letter be sent by the

(*x*) *Ibid*; and *R. v. Almon*, 5 Burr. 2689. *R. v. Dodd*, 1724, 2 Sess. C. 33. Dig. L. L. 27. And Wood's Ins. 445. 2 Sess. C. 33. 12 Vin. Ab. 229. *Plunkett v. Cobbett*, 5 Esp. C. 136. Haw. P. C. c. 73, s. 10, Barnard. 308.

(*y*) *R. v. Dodd*, 2 Sess. C. 33. Dig. L. L. 27; for the law presumes that the master is acquainted with what his servant does in the course of his business. And see *R. v. Nutt*, Barnard. 308. Fitzg. 47. Dig. L. L. 27, where it was so held, although the defendant lived a mile from her shop, and had been bed-ridden for a long time.

(*t*) See 1 Haw. c. 73. *R. v. Woodfall*, *ibid.* sec. 10.

(*u*) *R. Woodfall*, 1 Haw. c. 73. s. 10.

(*a*) *Harding v. Greening*, 1 Moore, 477.

• (*b*) *R. v. Johnson*, 7 East, 65. *R. v. Dodd*, 2 Sess. C. 33. Bac. Ab. tit. *Libel*, 497. Wood's Ins. 445.

edited by another, though the publication was made without the knowledge of such proprietor. *Andres v. Wells*, 7 Johns. 260. But if a printing-press and newspaper establishment be assigned to a person merely as security for a debt, and the press remain in the sole possession and management of the assignor, the ownership of the person holding the security or lien is not such as will render him liable to an action as a proprietor. *ibid.*]

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post it is a publication by the defendant in any county to which the letter is in consequence sent (z).

Where the defendant has admitted that he is the * author of a particular book, errors excepted, it is incumbent upon him to prove that the errors so excepted are material (u).

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In the case of libel, as well as in all others, whether civil or criminal, presumptive evidence must be resorted to in failure of direct and positive testimony; and the same reasonable inferences and presumptions are to be made by the juries as in all other instances.

Publication in a particular county.

In criminal cases it is always, and in civil cases it is in some instances, necessary to prove a publication within the particular county. It seems that wherever the publication of a libel has once been authorized by the defendant he is guilty of a publication in whatever county the libel shall afterwards be in consequence published (x). Where the writer of a libel sent it by the post, directed to *A. B.* in the county *B.* and it was in consequence sent into the county *B.* and from thence sent by the post to *A. B.* in the county *M.* where *A. B.* received it, and read it, it was held to be a publication in the county *M.* (y).

If the libel be dated of a particular place, the date * is evidence that it was written there (z). It has been said, that the post-mark upon a letter is not *prima facie* evidence to prove that a letter has been put into the post-

(z) *R. v. Watson*, 1 Camp. 215. The defendant was indicted in Middlesex, the letter had been sent by the post into Berkshire, and had been sent from thence to the prosecutor, in Middlesex.

(u) *R. v. Hall*, 1 Str. 416.

(x) B. N. P. 6. *R. v. Johnson*, 7 East, 65. If *A.* send a libel to London to be printed and published, it is his act in London, if the publication be there. *R. v. Middleton*, B. N. P. 6. *vid. infra*, *R. v. Watson*. In *R. v. Johnson*, C., in the county of Middlesex, received a letter in the handwriting of the defendant, offering to supply political matter for publication by C. in a public journal, and two letters were afterwards received by C., also in the defendant's handwriting. It was held that these letters might be read in evidence; and that as they indicated that the writer had sent them for publication there, and they had in fact been published, this was evidence of a publication, by the procurement of the defendant in Middlesex.

(y) *R. v. Watson*, 1 Camp. 215. *R. v. Girdwood*, East's P. C. 1116. 1120. The sending a letter by post from the county *A.* to the county *B.* is a publication in *A.* *R. v. Williams*, 2 Camp. 507, per Lord Ellenborough, C. J.; and see the opinion of Abbott, C. J. and Best, J. in *R. v. Burdett*, 3 B. & A. 717. Post, 855; and see tit. *Venue*.

(z) *R. v. Burdett*, 4 B. & A. 95.

office at the place denoted by the post-mark (a); it seems, however, from a later authority, that the post-mark is a fact admissible in evidence, when corroborated by other circumstances (b).

A general confession that the defendant was the *writer* of a libel does not amount to an admission that he *published* it, still less is it a confession that he published it in any particular county (c) (1).

Publication in
a particular
county.

A late case upon this subject excited much interest, and exercised great talent and profound learning. The points were shortly as follow; the information charged the defendant with composing, writing and publishing a libel in Leicestershire. *A.* stated that he received the libel, which was in the hand-writing of the defendant, from *B.* on the 24th of August (d), it was contained in an envelope, which

(a) *R. v. Watson*, 1 Camp. 215. But the defendant was found guilty of another publication.

(b) *R. v. Johnson*, 7 East, 65; note, that in this case the post-mark seems to have been perfectly immaterial; but upon principle there seems to be little doubt that a post-mark upon a letter, in the handwriting of a defendant, and received through the medium of the post, is evidence, as a circumstance arising in the usual course and routine of business.

In the case of *Fletcher and others, Assignees of Parry v. Braddyll*, Cor. Holroyd, J. Lancaster Summ. Ass. 1822, a letter of one of the bankrupts was offered in evidence to prove an act of bankruptcy; it was objected that proof ought to be given of the existence of the letter previous to the bankruptcy, and Holroyd, J. admitted the post-mark on the letter as *prima facie* evidence to prove the existence of the letter at that time. The post-mistress of Lancaster was called to prove that the letter was stamped with the Wakefield post-office stamp.

(c) The Seven Bishops case, St. Tr. 4 Jac. II, where the defendants, in Middlesex, admitted their signatures to a petition which had been prepared and signed in Surrey; but it was held that this was not evidence of a publication of that which was termed (but grossly misnamed) a libel in the county of Middlesex. And see the observations upon this case by Ld. Ellenborough, C. J. and Lawrence, J. in *R. v. Johnson*, 7 East, 65; and *R. v. Burdett*, 4 B. & A. 95. 314.

(d) *A.* did not state where he received it, but it was assumed, and no doubt it was the fact, that he received it in Middlesex.

(1) [An affidavit of the defendant (who had been chairman of a public meeting at which the libel in question had been signed by him and ordered by the meeting to be published) and of another person, which the defendant in his own affidavit referred to as correct, stating that the address was ordered to be published, and admitting and justifying the publication, together with a copy of the address annexed to the affidavits and referred to in them,—were held sufficient evidence of publication. *Lewis v. Few*, 5 Johns. 1.]

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* had been destroyed, but which, to the best of the witness's recollection, was addressed to *B.* who was the professional friend of the defendant; there was no trace of any seal, either on the envelope or paper. The paper was dated Kirby Park, August the 22d. Kirby Park (the defendant's seat) being situate in Leicestershire, 100 miles from London, not far from the boundary between the counties of Leicester and Rutland. The defendant was seen in the county of Leicester, near Kirby Park, on the 22d and on the 23d of August, and there was no evidence of his having left the county of Leicester till after the publication (e) of the paper, which took place on the 25th; the only words either on the paper or envelope besides the libel, were "forward this to *A.*" (the witness). The paper was addressed to the electors of Westminster; and *A.* had no reason for supposing that the defendant intended that it should be published, except that it was so addressed. *A.* having been required to give up the author, the defendant wrote a letter, admitting that he was the author. No evidence was given on the part of the defendant. It was objected at the trial, and afterwards in the Court of King's Bench, after the conviction of the defendant, on a motion for a new trial, that there was no evidence of a publication in *Leicestershire*. The learned Judge left it to the Jury to say, whether there had been a publication in Leicestershire, by an open delivery of the libel. The question, and the principles relating to it, were discussed on the motion for a new trial, with all the aid which talent, learning, experience and unwearied diligence could supply. The ultimate, although it seems not the unanimous, decision of the Court was * that the evidence was sufficient to warrant the conviction (f).

(e) i. e. in the public newspapers.

(f) *R. v. Sir Francis Burdett*, bart. 3 B. & A. 717. 4 ib. 314. The Judges delivered their opinion *seriatim*. Best, J. was of opinion that there was presumptive evidence of an actual publication in Leicestershire, and that the sending the libel by the post from that county amounted to a publication. (*R. v. Watson*, 1 Camp. 215. *R. v. Williams*, 2 Camp. 506. Codex, Lib. 9, tit. 36. (and see *Girdwood's case*; East's P. C. 1116. 1120.)

Holroyd, J. was of opinion, that the composing and writing a libel in the county of L. and afterwards publishing it, although the publication was not within the county of L., was an offence sufficiently charged as a substantive offence in the information, and which gave jurisdiction to a Jury of the county of L. (see *R. v. Beere*, 2 Salk. 417. Carth. 409. Holt, 422. *R. v. Knell*, Barnard. 205. *R. v. Carter*, 9 St. Tr.) and that the composing and writing, with the intent afterwards to publish, also amounted to a misdemeanor; and that a Jury of the county of L. might inquire as to the publish-

* Some proofs are to be noticed which apply particularly to the proprietors and publishers of newspapers. Upon an indictment for a libel, published in a newspaper called the World, proof that the paper was sold at the defendant's office, and that he *as proprietor* had given a bond to the stamp-office, as required by the stat. 29 Geo. III. c. 10, s. 10, for securing the duties on advertisements, and that he had from time to time applied to the stamp-office respecting the duties, was held to be strong evidence to prove a publication by him (*f*) (1)

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Where the affidavit made by the printer and proprietor of a newspaper (according to the statute 38 Geo. III. c.

ing in another county, in order to prove the defendant's intention in composing and writing in the county of L. And that in the case of an aggregate charge, part of which being in itself a substantive misdemeanor, is committed within a particular county, the Jury may inquire into the remainder, although done elsewhere; that there was reasonable evidence of a publication in L.; and that a delivery of a libel within the county, although it be sealed, is a publication in law.

Bayley, J. was of opinion that there was not sufficient evidence to support a presumption that there had been an open delivery of the libel in L., considering that positive proof might have been given by calling B. as a witness. He gave no opinion on the question, whether a close delivery amounted to a publication. He held, that the whole *corpus delicti* must be proved within one county; and that there was no distinction in this respect between felonies and misdemeanors. He gave no opinion on the question, whether the composing of a writing, with intent to publish, constituted an offence.

Abbott, C. J. intimated his opinion, that mere delivery constituted a publication. He held that the facts warranted the conclusion, that the paper had been delivered by the defendant in L., to B., in the state in which it had been delivered by the latter to A. That even supposing the libel to have been delivered by the defendant in a different county, yet as the whole was a misdemeanor compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of L. where one of those acts had been done.

(*f*) *R. v. Topham*, 4 T. R. 126.

(1) [Where a printer testified that he had been in the defendant's office where a certain paper was printed, and saw it printed there, and that he believed the paper produced by the plaintiff was printed with the types used in the defendant's office; this was held to be *prima facie* evidence of the publication by the defendant. *Southwick v. Stevens*, 10 Johns. 442. It is sufficient proof of a person's being the printer of a newspaper in which a libel is published, for such paper to go to the jury, that the papers were deposited in a hole behind the door of a public library, and that his common clerk received payment therefor. *Respublica v. Davies*, 8 Yeates, 126.]

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8 (g), stated the place where it was * printed in London, and the newspaper given in evidence stated at the foot of

(g) By sect. 1, no person shall print or publish any newspaper until certain affidavits, &c. shall have been delivered to the commissioners of stamps, &c.

By sect. 2, these must contain a true description of the proprietors, or of two of them, and of their places of abode ; of their shares in the paper, and the house in which it is intended to be printed, and of its title.

By sect. 9, all such affidavits and affirmations, or copies thereof, certified to be true copies according to the Act, shall, in all proceedings, civil and criminal, touching any newspaper, or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter or thing contained in any such newspaper or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations as are hereby required to be therein set forth, against every person who shall have signed, sworn, or affirmed such affidavits or affirmations ; and shall also be received and admitted in like manner, as sufficient evidence of the truth of all such matters, against all and every person who shall not have signed or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer or publisher of such newspaper, or other paper, unless the contrary shall be satisfactorily proved. The section then contains an exception in favour of such as have, before the publication of the paper in question, delivered in to the commissioner an affidavit, stating that they have ceased to be the printers, &c. of such paper.

By the 10th section, in some part of every newspaper, &c. shall be printed the names, additions, and places of abode of the printers, &c. and the place where the same is printed.

By sect. 11, it shall not be necessary, after any such affidavit, &c. or a certified copy thereof, shall have been produced in evidence as aforesaid, against the persons who signed and made such affidavit, or are therein named, according to this act, or any of them, and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intituled in the same manner as the newspaper, or other paper mentioned in such affidavit or copy is intituled, and wherein the name or names of the printer and publisher, or printers and publishers, and the place of printing, shall be the same as the name or names of the printer and publisher, or printers and publishers, and the place of printing, mentioned in such affidavit or affirmation, for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper or paper to which such trial relates, was purchased at any house, shop, or office belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves, or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold.

By sect. 13, it is enacted, that a certified copy of such affidavit or affirmation shall be delivered by the commissioners to the person requiring it, upon payment of one shilling.

By sect. 14, in order to prevent the inconvenience which might result from requiring the personal attendance of the commissioners,

it that it was printed at * No. 3, Warwick-lane, London, and it was also proved that the defendant's printing-house was there; it was held to be sufficient evidence of a publication in London (h)

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Proof of publication.

The observations which have been made as to variances between the allegation and proof of words, apply still more forcibly to the case of a libel, which must be set out in the pleadings *secundum tenorem*, or *in hæc verba*, or by equivalent words (i) (1).

it is enacted, that a certificated copy of any affidavit or affirmation, proved to be signed by the officer who has the custody of the original, shall be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and that such copies, so produced and certified, shall also be received as evidence that the affidavit or affirmation of which they purport to be copies have been sworn or affirmed according to this act; and shall have the same effect in evidence as the originals would have had in case they had been produced and proved to have been duly so certified, sworn and affirmed, by the person appearing by such copy to have sworn or affirmed the same as aforesaid.

By the 17th section, it is enacted, that every printer or publisher of any newspaper or other such paper, shall within six days, deliver to the commissioners, or their officer, one of the papers so published, signed by the printer or publisher in his hand-writing, with his name and place of abode; and that the same shall be kept by the commissioners or their officer, under a penalty, in case of neglect by such printer or publisher, of 100*l.*; and that upon application by any person to the commissioners or their officer, to have such paper produced in evidence in any proceeding, whether civil or criminal, such commissioners or officer shall, at the expense of the applicant, at any time within two years from the publication, either cause the same to be produced in the Court, and at the time when the same is required to be produced, or shall deliver the same to the applicant, on his giving reasonable security at his own expense, for returning the same; and that in case such commissioners or their officer cannot, by reason of a previous application, comply with the terms of a subsequent one, they shall comply with such subsequent one as soon afterwards as they shall be able so to do.

(h) *R. v. Hart & White*, 10 East, 94.

(i) See *Dr. Sacheverell's case*, 2 Salk. 417. *R. v. Bear*, 1 Ld. Raym. 414; Holt, 348. 350; Starkie's Crim. Pl. 2d. edit. 124; Starkie's Law of Libel, 314.

* (1) [In a declaration for a libel, if the plaintiff declare *quæ sequitur in his verbis, scilicet*, the minutest variance between the libel offered in evidence and the declaration is fatal. *Semb. Harris v. Lawrence & al.* 1 Tyler, 156. *Olin v. Chipman*, 2 ib. 148. So in an indictment, if the *tenor* is undertaken to be recited, and the recital is variant in a word, or letter, so as thereby to create a different word. *The State v. Coffey*, 2 Taylor, 272. Where an indictment for a libel charged the defendant with publishing that A. was "worse than the lowest vagabonds" &c. and the words proved were "worse

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IV.

Variance.

It is no variance, although the libel read in evidence contain matter in addition to that which is set out on the record, provided the additional part does not by its context alter the sense of that which is set out (*k*) (2). But if the additional matter causes the libel proved to vary in sense from that alleged, or if by a selection of * 859 * passages, and setting them out as one continuous libel, the sense be altered, the variance will be fatal (*l*).

With respect to the alteration of one or more letters of a word, the rule seems to be now settled, that if the sense be altered by the changing of one word into another the variance will be fatal, but not otherwise (*m*).

2dly. Where the plaintiff or prosecutor has fairly launch-

(*k*) See *Sir J. Sydenham's case*, *supra*, 846; and *Tabart v. Tipper*, 1 Camp. 350. One count of a declaration for a libel stated the words as follow: "My sarcastic friend, by leaving out the repetition or chorus of Mo.—T's poem, greatly injured the *tout ensemble*, &c." The words proved in evidence were, "My sarcastic friend *MOPOX*, by leaving out," &c. and Lord Ellenborough held that the variance was material. See also *tit. Variance*; and *Cartwright v. Wright*, 5 B. & A. 615.

(*l*) 1 Camp. 353.

(*m*) According to the distinction taken in *The Queen v. Drake*, 2 Salk. 660; 3 Salk. 224; as where the word *not* was inserted for *nor*. If the sense be not altered, the variance is immaterial, even upon an indictment for perjury. As where the assignment of perjury alleged that the defendant had sworn in the affidavit on which the perjury was assigned, that he *undertood* and believed, whereas the words in the affidavit were "*understood* and believed;" and upon motion for a new trial, *Ld. Mansfield*, after observing upon the great length of nicety to which the cases had been carried, particularly the case in *Hutton*, where *Indicari* had been written for *Indictari*, said that the case had been shaken by the doctrine laid down in *Hawkins*. (2 Haw. c. 46, s. 190.) And that the true distinction had been taken in *The Queen v. Drake*. *R. v. Beech*, Leach, C. C. L. 158. See *R. v. May*, Leach, 227. *Starkie's Crim. Pl. tit. Variance*. *Starkie's L. Libel*, 315. *Infra*, *tit. Perjury—Variance*. *R. v. Mary-Ann Taylor*, 1 Camp. 404. [See note (1) on preceding page.]

William for Wm. is a fatal variance. Per *Bayley*, J. *York Summ. Ass.* 1821.

Where a declaration alleged a publication by the defendant, omitting a reference, from which on reading the libel it appeared

than the lowest vagabonds"—a new trial was granted to the defendant. *Walsh v. The State*, 2 M'Cord, 248. But it is not a ground to arrest judgment, that the declaration professed to set out a libel in *hæc verba*, and that there was an immaterial variance. *Calhoun v. M'Meers*, 1 Nott & M'Cord, 422.]

(2) [Where the declaration, in an action for a libel, charges the publication, without purporting to set it forth in *hæc verba*, proof of the publication of a libel, containing part of the libellous matter charged, is sufficient. *Metcalf v. Williams*, 3 Littell's Rep. 389.]

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ed his case, by proof of the words or libel, without splitting upon a variance, he is next, in the usual order of proof, to establish in evidence the prefatory averments and innuendos which are alleged in the declaration or indictment, and which are essential to his case. If the publication affects the plaintiff in a particular character, it must be proved that the character belonged to him, or that he filled the office or situation at the time of the publication complained of. It has already been seen that a man's special character is usually established by evidence of his having acted in that capacity, for then a *presumption in fact* arises, that he *legally* acted * in that capacity (n). And where * 860 the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation, trade or business, is of course the only evidence which the fact admits of.

 Proof of averments, &c.

The evidence of character, in actions brought by physicians, attornies (o), &c. has already been adverted to (p). Notwithstanding the doubts which have prevailed upon the subject, the better opinion seems to be, that evidence of the plaintiff's *having acted* in the particular character in which the words affect him, is *prima facie* evidence of his title to it. Where, however, there is any reason to apprehend that evidence will be offered on the other side to disprove the fact, the plaintiff ought to be prepared with the best evidence to establish it. If the declaration allege a diploma or appointment, it must be proved, although the special allegation was unnecessary (q).

In general, if the slander or libel assume that the plaintiff possesses the character, or fills the situation or office

to be a quotation, the variance was held to be fatal. *Cartwright v. Wright*, 5 B. & A. 615. As to variances in allegations of intention, see *Post. tit. Variances*, and the observations of Buller, J. in *Peppin v. Solomon*; 5 T. R. 497.

In an action for a libel on *A. B.* of and concerning *A. B.* and of and concerning *A. B.* in his character of an attorney, the plaintiff failed in proof that he was an attorney, and was nonsuited by Abbot, C. J. and on a rule to set aside the nonsuit, the Judges were equally divided upon the question of variance. *Lewis v. Walter*, K. B.

Where the plaintiff had a clear right to sell the whole of a certain interest, which he derived from the defendant, but his right to sell part only, was doubtful; and he alleged that he put up his said interest to sell, and that the defendant published, &c. of and concerning his said interest, it was held that the allegation was not supported by proof that he put up an underlease of part of the term only; for a grant of an underlease is not a sale of any thing; and therefore the proof did not sustain the averment *pro tanto*. *Millman v. Pratt*, 2 B. & C. 486.

(n) *Supra*, 373, and the cases there cited. (o) *Supra*, 130. 373.

(p) *Supra*, 373.

(q) *Ibid.*

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fatory aver-
ments and
innuendos.

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in which he is defamed, it operates by way of admission (*r*), and is *prima facie* evidence of the fact. According to the general rule, all averments which are material, that is, which are connected with the charge, must be proved, but those which are immaterial need not be proved (*s*). An information alleged that the * King had issued a particular proclamation, and also averred, that on occasion of that proclamation divers addresses had been presented to his Majesty by divers of his subjects; the information charged the defendant with a publication with intent to bring the said proclamation into contempt, but did not refer to the addresses; it was held to be essential to prove the fact that such a proclamation was issued (*t*); but it seems that it was unnecessary to prove that any addresses had been presented (*u*).

So in general where the declaration or indictment avers the existence of particular facts, and that the publication was of and concerning those facts, their existence must be proved. In an action for a libel on a constable, alleged in both counts of the declaration to have been published, concerning his conduct in the apprehension of persons stealing a dead body, it was averred in the first count what that conduct had been, and it was alleged that he had carried the dead body to Surgeon's Hall; the Court held that it was necessary, under both counts, to prove this introductory allegation, although the plaintiff needed not to have burthened himself with that proof (*x*) (1).

Colloquium
and innuendos.

The colloquium, and other averments, which connect the words or libel with the plaintiff or subject-matter before stated, must next be proved. This is usually done by the testimony of one or more witnesses who knew the parties and circumstances, and who state their opinion and judg-

(*r*) *Berryman v. Wise*, 4 T. R. 366. And see *Smith v. Taylor*, 1 N. R. So where the libel itself showed that certain acts of outrage had been committed, it is evidence to support an averment of the fact in the introductory part of the record. See the observations of Bayley, J. 4 M. & S. 548.

(*s*) *Supra*, 347. *R. v. Holt*, 5 T. R. 436.

(*t*) *R. v. Holt*, 5 T. R. 436.

(*u*) Per Buller, J. *Ibid.* 446. As if the slander or libel state the plaintiff to be an attorney or physician.

(*x*) *Teesdale v. Clement*, 1 Chitty's R. 603.

(1) [On an indictment for a libel on J. C., describing her as the *only* daughter of the widow R., the innuendo averred the identity of the prosecutrix and the daughter of the widow R: It was held that it was not necessary to prove the prosecutrix to be her *only* daughter. *The State v. Perrin*, 1 Const. Rep. 446. Matters stated as inducement, in a declaration for a libel, may be proved by *parol*. *Southwick v. Stevens*, 10 Johns. 443.]

ment as to the *intention* of the defendant to apply his words or libel to the parties or circumstances as alleged (2) It seems to be sufficient * if the witness in the first instance state his general belief and opinion as to the defendant's meaning, without disclosing his reasons, leaving it to the defendant, if he think proper, to inquire as to the grounds and reasons which support that conclusion.

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In an action for oral slander or libel, the proof of malice either results from the slander itself, or is matter of extrinsic evidence. Where the slander or libel stands unexplained by any collateral evidence, which indicates the intention of the party, and no light is derived from the occasion and circumstances attending the publication, by which the mind of the author can be read, the Court and Jury necessarily derive their inference from the words themselves, reading and understanding them according to their plain import and meaning, in their usual and ordinary sense. If the natural tendency and import of the expressions used be to vilify defame and injure, then, according to every principle of reason and justice, the plaintiff must be taken to have acted maliciously, that is with a view to effect those consequences to which the means which he has used naturally and obviously tend (y).

Evidence of
malice.

(y) *Supra*, tit. *Intention*. [*Erwin v. Sumroo*, 1 Hawks, 472. *Jackson v. Stetson, & ux.*, 15 Mass. Rep. 48.] Lord Kenyon's observations in *R. v. Lord Abingdon*, 1 Esp. C. 228. In *R. v. Creevy*, 1 M. & S. 273, which was an indictment against a member of parliament for publishing in a newspaper a speech which he had delivered in the House of Commons, it was objected that malice ought

(2) [The plaintiff cannot prove by witnesses that from reading the libel they believe he was intended therein. *Van Vetchten v. Hopkins*, 5 Johns. 211.

From the nature of an innuendo, it cannot be the subject of proof by witnesses. *Aliter*, of an averment and colloquium, which introduce into the pleading extrinsic matter, that is the proper subject of proof. *ibid.*

By a default and interlocutory judgment, the fact of publication and the truth of the innuendos are admitted—and the defendant cannot, before the jury of inquiry, call their attention to other paragraphs contained in the same publication, in order to show a different meaning of the words complained of, than that set up by the plaintiff. *Tillotson v. Oeetham*, 3 Johns. 56. See *The State v. Neese*, 2 Taylor, 270. *Caldwell v. Abbey*, Hardin, 530. *Davis v. Davis*, 1 Nott & M'Cord, 290. *Hoyle v. Young*, 1 Wash. 152. *Cave v. Shelor & ux.*, 2 Munf. 193. *Burtch v. Nickerson*, 17 Johns. 217. *Lindsey v. Smith*, 7 ib. 359. *McClaghry v. Wetmore*, 6 ib. 82. *Vaughan v. Havens*, 8 ib. 109. *Van Vetchten v. Hopkins*, ubi sup. *Chaddock v. Briggs*, 13 Mass. Rep. 248. *Shaffer v. Kintzer*, 1 Binney, 543. *Rice v. Mitchell*, 2 Dallas, 58. *Packer v. Spangler & al.*, 2 Binney, 60. *McClurg v. Ross*, 5 ib. 218. *Fowle v. Robbins*, 12 Mass. Rep. 498.—as to the doctrine of innuendo and colloquium.]

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malice.

Wherever it appears on the plaintiff's own showing, * or on evidence on the part of the defendant, that the publication was made upon an occasion, and under circumstances which afford a *prima facie* presumption, that, notwithstanding the tendency of the words to defame or disparage the plaintiff, they were not spoken or published with that view, but, on the contrary, in the *bona fide* discharge of some legal or moral duty to society, or even in the fair and honest prosecution of the rights of the party himself, or the protection of his interests, the plaintiff will fail, unless he can establish the malicious intention by extrinsic evidence, and show that the defendant used the occasion as a mere colour and pretext for venting his malice. In some instances, indeed, which will be afterwards noticed, where the publication occurs in the performance of a legal duty, which the defendant is *bound* to perform, the occasion of publication is not merely *evidence* to rebut the inference of malice, but is an absolute bar to the action; as, where the party was acting in the capacity of a judge, or witness, or party in the cause (z). And in such cases the malice of the party is immaterial. In other cases, where the publication arises in the course of discharging any duty, the performance of which is required by the ordinary exigencies of society, although the party was under no absolute legal obligation to perform it, the occasion operates in the nature of evidence, and supplies a *prima facie* justification.

Thus where a party having *probable cause* lays claim to land, and a loss results to the real owner, it is a question for the jury whether the defendant acted *bona fide*; and * 864 the want of probable cause for making * the claim, unless it be such as induces the jury, under the circumstances, to infer that the defendant acted out of malice (a), will not

to be proved by extrinsic evidence; but *Le Blanc, J.* informed the Jury, that where a publication is defamatory the law infers malice, unless any thing can be drawn from the circumstances attending the publication to rebut that inference; and added, that in point of law, the circumstance of its being a publication of a speech delivered by a member of the House of Commons did not rebut it. *Vide supra*, tit. *Intention*; and *infra*, tit. *Malice*.

(z) *Infra*, 874. So where the defendant pleads that the allegations are true. See *Starkie's Law of Libel*, 202; or, where the defendant pleads that he has merely repeated the words of another, and that he has given up the author. *Ibid.* 224.

(a) *Pitt v. Donovan*, 1 M. & S. 639. *Smith v. Spooner*, Cor. Ld. Ellenborough, 1811. 3 Taunt. 246. *Starkie on Libel*, 236. Where the owner of a house had prevented the plaintiff, his lessee for years, from disposing of the remainder of his term, by falsely asserting that he had no title, it was left to the Jury to say whether there

entitle the plaintiff to recover (1.) Where a master gives the character of a service, malice will not be presumed, but must be expressly proved (b); and that whether the master be or be not asked for a character (c). In such cases, proof that the master sought occasions of speaking ill of the servant, without any application to him for a character, and that the representation was made in heat and passion, after a quarrel between them, and above all, that the master *wilfully* misrepresented the servant's character, contrary to his better knowledge, are important manifestations of malice in support of the action (d). Again, where a communication, imputing misconduct to the plaintiff, is made confidentially by a person *interested*, or to a person *interested*, no action is maintainable, provided it was made *bona fide* with a view to the interests of those concerned (e); although * in such case the expressions used * 865 are stronger than the exigency of the case warranted, it is a question for the jury whether they were used with an intention to defame, or with good faith to communicate facts, in the knowledge of which the party had an interest (f).

was malice or not. See *Gerard v. Dickenson*, 4 Co. 18; and the cases cit. d, Starkie on Libel, 232.

(b) *Weatherston v. Hawkins*, 1 T. R. 110. 4 Burr. 2425. *Edmonson v. Stephenson*, B. N. P. 8.

(c) *Rodgers v. Sir Gervase Clifton*, 3 B. & P. 587.

(d) Ibid. And see *Lowry v. Aikenhead*, there cited. If the plaintiff, knowing what character the master will give, procure it to be given for the purpose of founding an action upon it, he will not, it is said, be entitled to recover.

(e) *McDougall v. Claridge*, 1 Camp. 267. Where the defendant wrote a letter to his bankers, charging the plaintiff, a solicitor, with misconduct in the management of their concerns, it appeared that the letter was written confidentially, and that the defendant was himself interested in those affairs, and *Ld. Ellenborough* nonsuited the plaintiff, and referred to the case of *Cleaver v. Sarraude*, where it appeared that the letter had been written confidentially by the defendant to the Bishop of Durham, to inform him of mal-practices on the part of the plaintiff as the Bishop's steward, and the learned judge nonsuited the plaintiff.

(f) *Dunman v. Bigg*, 1 Camp. 269, n.—where the defendant having supplied beer to the plaintiff, for which Leigh was surety, went to Leigh and complained of the plaintiff's conduct in terms of

(1) [In an action for slandering the plaintiff's title to property, by a letter written by the defendant, if it appear that a loss to the plaintiff, in a sale of the property, was occasioned by such letter, the defendant ought to make reparation, though the jury believe that he designed no injury. *Ross v. Pines*, 3 Call, 568. *Sed vide* 4 Burr. 2422. *Yelv.* 89, *note*, and cases above, *note* (a).]

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Where an advertisement was published in a newspaper, the tendency of which was to throw upon the plaintiff a suspicion that he had been guilty of bigamy ; yet, as it appeared that this had been done at the instance of the plaintiff's wife, it was left to the jury, under the circumstances, to say whether it had been done *bona fide* on behalf of the wife, in order to ascertain a fact in which she was materially interested (g). So where the alleged slander was contained in a communication made by the defendant, a serjeant in a volunteer corps, of which the plaintiff was also a member, to the committee by which the affairs of the corps were conducted, that the plaintiff was an improper person to remain a member of the corps (h). So where the words are delivered by way of admonition or advice (i) (1), or spoken in confidence * and friendship (k). Upon similar principles, fair criticisms upon the merits of literary works are not actionable.

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If a commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, or follow the plaintiff into private and domestic life, for purposes personally slanderous, and unconnected with the work

great opprobrium, there being a sum then due for beer, and *Ld. Ellenborough*, considering that the defendant had been betrayed by his passion into unwarrantable expressions, left the question of malice to the jury.

(g) *Delany v. Jones*, 4 Esp. C. 191.

(h) *Barbaud v. Hookham*, 5 Esp. C. 109. [See Mr. Day's note to this case.]

(i) See the remarkable case, *Cro. J.* 90, cited by *Ld. Coke* ; where a clergyman, in his sermon, recited as a story out of *Fox's Martyrology*, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted on him, and died by the hand of God ; whereas in truth he never was so plagued, and was himself present at that sermon ; and he brought his action on the case ; and *Wray, J.* delivered the law to the jury, that it being delivered but as a story, and not with any malice, or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty.

(k) *Haver v. Dawson*, B. N. P. 8. An action was brought against a man for warning his friend, respecting the circumstances of the plaintiff, and *Pratt, C. J.* directed the jury, that if they were of opinion that the words were not spoken out of malice, but in confidence and friendship, and by way of warning, they should find the defendant not guilty ; which they did. [S. P. Per *Jackson, J.* *Jackson v. Stetson & ux.* 15 Mass. Rep. 48.]

(1) [If words actionable in themselves are spoken between members of the same church, in the course of their religious discipline, and without malice, no action will lie ; and the jury are to decide whether there be malice or not. *Jarvis v. Hathaway*, 3 Johns. 180.]

whose merits he professes to discuss, he exercises, it has been said by authority, a fair and legitimate right (l); but it is a question for the jury, whether the defendant has not made false assertions in point of fact, for injurious purposes, or exceeded the bounds of fair and legitimate criticism for the purpose of personal slander (m). Where the ground of complaint was, that the defendant had charged the plaintiff with the publication of books of an improper and immoral tendency, Lord Ellenborough informed the jury that it was certainly libellous gravely to impute to a bookseller a publication to which he was a stranger, as the evident tendency of the imputation was to hurt him in his business (n). Where an * action was brought for publishing * 867 in a newspaper a paragraph, stating that the songs at a place of public entertainment were not of the plaintiff's composition, as they professed to be, and that the performance was despicable, Lord Kenyon said, "the editor of a public newspaper may fairly and candidly comment on any place, or species, of public entertainment, but it must be done fairly, and without malice, or view to injure or prejudice the proprietor in the eyes of the public; if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, it is a libel, and actionable (o).

It seems to be a general rule, embracing all the cases above referred to, where the occasion affords presumptive

(l) By Ld. Ellenborough, C. J. in *Carr v. Hood*, 1 Camp. 358. *n. Tabart v. Tipper*, 1 Camp. 350.

(m) *Ibid.*

(n) *Tabart v. Tipper*, 1 Camp. 350. In that case the counsel for the defendant were permitted to inquire, upon cross-examination, whether the plaintiff had not published particular books, but *qu.*—(1).

(o) *Dibdin v. Swan & Boslock*, 1 Esp. C. 29.

(1) [In slander for charging the plaintiff with perjury in a judicial proceeding, the defendant, under the general issue, though not permitted to prove the falsity of the words sworn by the plaintiff, was allowed to interrogate a witness as to *what* the plaintiff swore—in mitigation of damages. *Grant v. Hover*, 6 Munf. 13. In *Kirtley v. Deck*, 3 Hen. & Mun. 388, it was held, in an action for charging the plaintiff with perjury in a court of record, that the defendant, on the plea of justification, could not give parol evidence of what the plaintiff swore to, without producing a copy of the record of that trial, to show that the testimony given by the plaintiff was material to the matter in question. See *Crookshank v. Gray & ux.* 20 Johns. 344.]

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prima facie evidence to rebut the inference of malice, that if it can be shown that the object of the party was malignant, and that the occasion was laid hold of as a mere colour and excuse for gratifying his private malice with impunity, the action is maintainable (1).

Malice, however, is in such cases an essential ingredient; for if it appear that the words, though slanderous, were spoken wholly without malice, and of this the jury are to judge, the defendant will be entitled to a verdict. Thus where the plaintiff brought an action against the defendant, for saying that he had heard that the plaintiff was hanged for stealing a horse, and upon the evidence it appeared that the words were spoken in grief and sorrow for the news, the plaintiff was nonsuited, because the words were not spoken maliciously (*p*).

- * 868 *It is no answer to the action to show that the words were spoken carelessly, wantonly, or in jest; it has been well observed, that the mischief to the reputation of the party grieved is in no wise lessened by the merriment of him who makes so light of it (*q*). A wanton disregard of the feelings and interests of others is perfectly consistent with malice, in every sense of the word, and a man does not the less intend to injure another, and therefore his act is not the less malicious because his primary object is to derive some private gratification or emolument to himself (*r*).

It is also to be observed generally, that although the occasion may protect the party in a publication to a certain extent, such as the circumstances and urgency of the case will fairly warrant, yet that any extraordinary and unnecessary publication, although not considered as resulting from a purely malignant intention, is still to be regarded as proceeding from a careless inattention to the in-

(*p*) Lev. 82; cited by Twisden, J. as a case which he had heard tried before Hobart, J., and all the court agreed that the plaintiff had been properly nonsuited. See 1 Vin. Ab. 540.

(*q*) Haw. P. C. c. 73.

(*r*) See the observations, tit. *Intention*. If a person were to write a libel, which was published through carelessness or accident, and damage were to result to the party reflected on, it seems that an action might be supported.

(1) [See Vol. I. p. 295, note (1), that in Massachusetts, a special plea in justification may be used by the plaintiff as conclusive evidence of the speaking of the words complained of—and that if the defendant fail to establish such plea, the plea itself is evidence that the words were spoken maliciously. See also Vol. I. p. 389, note (1).]

terests and welfare of others, which is culpable in the eye of the law (s).

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In an action by a servant against a former master for giving a false character, the plaintiff, in order to establish the *malicious intention*, may prove the falsity of the representation made by the defendant (t). It * has been said, * 869 that where the defendant has made a charge against the plaintiff of dishonesty and misconduct, the latter may adduce general evidence of good conduct, even antecedently to the service, general character being in some respects in issue (u).

Proof of malice.

For the purpose of proving malice, it seems that any acts or words used by the defendant, tending to prove a

(s) *Vid. infra*, 875; and see *Brown v. Croome*, 2 Starkie's C. 297, where Ld. Ellenborough held that an advertisement, addressed by an interested party to the creditors of a bankrupt, but reflecting strongly on the character of the bankrupt, would not be justifiable, if the legal object could have been effected by means less injurious.

(t) *Rodgers v. Clifton*, 3 B. & P. 587. The master there described the servant as a bad tempered, lazy, impertinent fellow, and the plaintiff proved (without objection), that whilst he was in the defendant's service he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed.

(u) *King v. Waring & ux.* 5 Esp. C. 13, *tam qu. and vid. supra*, 367. There seems to be much doubt as to the principle of this case; it has been said, that a servant, in an action of this nature must prove the character to have been given *maliciously* as well as *falsely* (*Weatherston v. Hawkins*, 1 T. R. 110); the reason seems to be, that the knowledge of the servant's misconduct may often be confined to the master himself, and being unable to prove it by his own testimony, if the general presumption arising from his not justifying were to operate against him, and it were to be inferred that his representation was false, he would be left without defence. In order to prevent this inconvenience, the law does not permit the presumption so to operate, but requires proof of malice *aliunde*. No stronger proof of malice can be given than by evidence that the master *knew* that the character which he gave was false. Any evidence therefore which tends to such proof seems to be admissible and material evidence, but proof of general character at an antecedent period is very remote from this object. In a late case, *Stuart v. Lovell*, 2 Starkie's C. 93, Ld. Ellenborough, C. J. refused to permit the plaintiff in an action for a libel, under the plea of the general issue, to go into evidence to disprove the charges contained in the libel. In a case before Abbott, L. C. J. (cited 4 B. & A. 132,) the prosecutor was admitted to give evidence of the falsity of the charge, under the particular circumstances of the case, the supposed libel containing little more than a narrative of certain facts supposed to have taken place in one of the West India islands. In such a case it is competent to the defendant, under the general issue, to prove the truth of the facts.

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malicious and malignant intention towards the plaintiff, are admissible in evidence; although the words so given in evidence be in themselves actionable, and * are not specified in the declaration (x), and although they were spoken subsequently to the words declared upon (y) (1). So where a libel was published in a weekly political paper, evidence was admitted of the previous sale of other papers, with the same title, at the same office, in order to show that the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal (z). In an action for a malicious prosecution of an indictment for perjury, evidence was admitted of an advertisement published by the defendant pending the libel, although an information had been granted for publishing that advertisement (a) (2).

In an action for words imputing perjury, the plaintiff was allowed to prove, that subsequently to the speaking of the words, the defendant preferred an indictment against him (b). Where, however, other words, not speci-

(x) *Lee v. Huson*, Peake's C. 166. *R. v. Pearce*, ibid. 75. *Mead v. Daubigny*, ibid. 125.

(y) *Russel v. Macquister*, 1 Camp. 49. n.

(z) *Plunkett v. Cobbett*, 5 Esp. C. 136.

(a) *Chambers v. Robinson*, 1 Str. 691.

(b) *Tate v. Humphrey*, 2 Camp. 73, n. Cor. Graham, B.; and afterwards by the court.

(1) [After proving the words laid in the declaration, the plaintiff may give in evidence other words, not actionable, to show malice in the defendant. *Wallis v. Mease*, 3 Binney, 550. *Eccles v. Shackelford*, 1 Littell's Rep. 35. Also actionable words, spoken after the suit brought. 3 Binney, *ubi sup.* *Kean v. McLaughlin*, 2 Serg. & Rawle, 469. *Shock v. McChesney*, 2 Yeates, 473. So the plaintiff may give in evidence the speaking by the defendant of the same words, after the suit brought. *Miller v. Kerr*, 2 McCord, 285. *Contra*, Kirby, 151, *Holmes v. Brown*.]

In *Thomas v. Croswell*, 7 Johns. 264, Mr. Justice Spencer says it is improper to suffer distinct libellous matter, subsequent to that charged in the declaration, to be given in evidence, to show the intent with which the matter charged was published. And in Tennessee, evidence of words spoken after suit brought is not admissible. *Secus*, as to words spoken before, though not declared on. *Howell v. Cheatham*, Cooke's Rep. 248.]

(2) [In an action against a printer for publishing of the plaintiff, that while he was member of a convention to form a constitution for the State, he avowed scandalous opinions (which were set forth in the libel)—it was held that an account of the debates of the convention reported by the defendant, in which the words in question did not appear, was evidence to show that the publication, on which the action was brought, was malicious. *Stow v. Converse*, 3 Conn. Rep. 325.]

fied in the declaration, are given in evidence, to prove malice, the defendant is at liberty to prove the truth of the words, for he had no opportunity of justifying (1). But it has been held, that other libels published by the defendant, of the plaintiff, are not admissible in evidence to prove malice, unless they refer to the libel set out in the declaration (c); and in such cases the Jury are not to consider the effect of such evidence in their measure of damages, but merely as a circumstance to prove malice (d). And as such evidence * is merely to be used as evidence of * 871 the *quo animo*, it seems that where there is no doubt as to the intention, it ought not to be restored to (f).

4thly, The general rule is, that no evidence of special damage is admissible unless it be averred in the declaration (2) whether special damage be the gist of the action, or be used as matter of aggravation, the words being in themselves actionable (g). But it has been said, that greater certainty is requisite where the special damage is the gist of the action, than where it is merely laid by way of aggravation (h).

Where the damage consists in loss of marriage, the plaintiff cannot, without specifying the individual with whom the marriage would otherwise have been contracted, give evidence of the loss (i). So if he allege loss of marriage

(c) By Sir J. Mansfield, C. J. in *Finnerty v. Tipper*, 2 Camp. 72.

(d) Ibid.

(f) See *Stuart v. Lovell*, 2 Starkie's C. 93. In strictness, however, such evidence, if tendered, ought to be admitted, for it is impossible either for the party or the Court to pronounce *a priori*; whether, independently of the proposed evidence, the Jury will be satisfied on the point of malice.

(g) B. N. P. 7. 1 Will. Saund. 243, n. 5. It was formerly held, that where special damage was the gist of the action, such special damage might be given in evidence, although the particular instances were not specified; otherwise, where the words were actionable. 1 Str. 666.

(h) Per Cur. in *Wetherell v. Clarkson*, 12 Mod. 597. 2 Lutw. 1295. See *Clarke v. Periam*, 2 Atk. 33; and *supra*, P. III.

(i) 1 Sid. 396. *Hunt v. Jones*, Cro. J. 499. 12 Mod. 597. *Barnes v. Prudlen*, 1 Roll. Ab. 58. 1 Vent. 4.

(1) [*Eccles v. Shackelford*, 1 Littell's Rep. 38.]

(2) [*Hersh v. Ringwalt*, 3 Yeates, 508. *Bostwick v. Nickelson*, Kirby, 65. *Bostwick v. Hawley*, ib. 290. *acc.* And where the words are not of themselves actionable, the proof of damage must be confined to the particular damage alleged in the declaration: Evidence of a general loss of reputation, by reason of the slander, is inadmissible. *Herrick v. Lapham*. 10 Johns. 281.]

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with *M. N.* he cannot give in evidence loss of marriage with any other person (*k*).

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In an action for slander, by which the plaintiff has lost his customers, he cannot give in evidence the loss of any whose names are not specified in the declaration (*l*). But where it is alleged as special damage that the plaintiff was prevented from selling his estate, * and that the bidding was prevented by the act of the defendant, the fact may be proved, although the names of particular bidders are not specified, for the loss is the preventing of the sale (*m*), and proof that persons would have purchased is evidence of such prevention.

Where the plaintiff alleged that he had been employed from time to time to preach to a congregation of dissenters, and that by reason of the words, the persons frequenting the chapel had wholly refused to permit him to preach there, and had discontinued to give him the gains and profits which they otherwise would have given, the Court, after a verdict for the plaintiff, on motion in arrest for judgment, held that the allegation of damage was sufficient, for he could not have stated the names of all his congregation (*n*). In such a case, therefore, it should seem that general evidence of the loss of emolument would be admissible.

Where the special damage was alleged to be the loss of the profits of several performances at a place of public amusement, it was held that the witnesses might be examined generally as to the diminution in the receipts; but that they could not be asked whether particular persons had not given up their boxes (*o*).

The plaintiff must also prove that the damage was the consequence of the defendant's act.

The connection between the wrong done by the defendant, and the loss to the plaintiff, is matter of evidence. It is nevertheless a rule of law that the damage must be the natural and immediate consequence of the wrongful act. The defendant asserted that the plaintiff had cut his master's cordage, upon which the master had discharged the plaintiff from his service, although he was under an engagement to employ him for a * term; but the Court held that the discharge was not a ground of action, since it was not

(*k*) 2 Ld. Raym. 1007.

(*l*) 8 T. R. 130.

(*m*) See *Smead v. Badley*, Cro. J. 397. W. Jones, 196.

(*n*) *Hartley v. Herring*, 8 T. R. 130. See Starkie on Libel, 368.

(*o*) *Ashley v. Harrison*, 1 Esp. C. 48. [Peake's C. 194 S. C.]

the natural consequence of the words spoken (*p*); the damage must be attributable *wholly* to the words.

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Where the reason which a party assigned for not employing the plaintiff was founded *partly* on the defendant's words, and partly on the circumstance that he had been previously discharged by another master; it was held that no action was maintainable (*q*).

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Where the defendant libelled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged, as special damage, that his oratorios had in consequence been more thinly attended, it was held by the Judge at the trial that the injury was too remote (*r*), and that it did not appear, but that the refusal to perform arose from caprice or indolence.

The plaintiff having once recovered damages cannot afterwards recover any ulterior compensation for any loss resulting from the same words (*s*).

5thly, The defendant may under the general issue give in evidence any matter which tends to disprove either the speaking the words, or the publication of the libel; (1) or to rebut the evidence of malice; or to disprove the * special damage, where that is the gist of the action. He may also prove under this issue, that the publication was made by the defendant, as a member of parliament, in the course

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(*p*) *Vicars v. Wilcocks*, 8 East, 1. And see *Morris v. Langdale*, 2 B. & P. 284, where it was doubted, whether the occasioning a third person to break his contract with the plaintiff was a sufficient special damage, since the plaintiff might obtain a satisfaction by action for the breach of contract, but *qu.* whether in actions for words, by means of which the plaintiff has lost a marriage, it would be a bar to the action to show that a promise of marriage had been made; and *qu.* whether it be not a sufficient damage that the plaintiff, by the defendant's wrongful act has had a benefit in possession wrested from him, and converted into a bare right to be enforced by action.

(*q*) 8 East, 1.

(*r*) *Ld. Kenyon, Ashley v. Harrison*, 1 Esp. C. 48.

(*s*) B. N. P. 7.

(1) [The defendant may show that the words, though in themselves actionable, were explained by a reference to a particular known transaction, not amounting to the charge which the words would otherwise import, and thus not furnishing a ground of action. *Van Rensselaer v. Dole*, 1 Johns. Cas. 279. S. P. *Edie v. Brooks*, Sup. Ct. of Pennsylvania, May, 1814. Wharton's Digest, 565, 566. *Shecut v. Dowell*, 1 Const. Rep. 35. *Thompson v. Bernard*, 1 Camp. 48.]

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fence.

of his duty as such (t) (1), or as a Judge (u), Juror, witness (x), or party, in the course of a judicial proceeding (y) (2), whether civil or criminal (z), even although the

(t) See 4 Hen. VIII. c. 8, and the declaration of the bill of rights, 1 Will. & Mary, stat. 2, c. 2. 1 Bl. Com. 164. But the privilege does not extend to a publication out of parliament. *R. v. Ld. Abington*, 1 Esp. C. 226. *R. v. Creevy*, 1 M. & S. 273.

(u) *Jekyl v. Sir John Moore*, 2 N. R. 341.

(x) 2 Inst. 228. 2 Roll. R. 198. Palm. 144. 1 Vin. Ab. 387. Cro. Eliz. 230.

(y) *Astley v. Young*, 2 Burr. 807. Cro. Jac. 432. [*Hardin v. Cumstock*, 2 Marsh. (Ken.) Rep. 481.] The rule extends to the case of *scandalum magnatum*. See *Beauchamp v. Sir R. Croft*, 3 Dyer, 285. [Keilw. 26. S. C.]

(z) 3 Bl. Com. 126. 10 Mod. 210. 219, 220. 1 Str. 691. The remedy is by an action on the case for a malicious prosecution, or perhaps by indictment, where the jurisdiction of the Court has been abused by a malicious prosecution. Haw. P. C. c. 73. s. 8. 1 Will. Saund. 132.

(1) [A member of either house of the legislature is not answerable for words uttered in the execution of his official duty, although they are spoken maliciously. And the privilege of free deliberation, speech and debate, secured to members of the legislature by the constitution of Massachusetts, exempts them from legal liability for every thing said or done by them in the exercise of the functions of their office, whether the exercise be regular according to the rules of the branch of which they are members, or irregular and against such rules. So this privilege protects all words officially spoken without the walls of the house to which a member belongs—either in a convention of the two houses, or in a committee, while executing the commission of the house then in session; and the house is in session, notwithstanding occasional adjournments for short intervals. But a member of the legislature is answerable for defamatory words uttered maliciously, and not in discharging the functions of his office, though uttered within the walls of the house of which he is a member. And he cannot be in the exercise of his official functions, as a member of a body, unless that body be in session. *Coffin v. Coffin*, 4 Mass. Rep. 1. It is, however, no justification of a charge against a town officer of misconduct in his office, that it was made in open town meeting, by an inhabitant of the town, while animadverting on such officer's conduct relative to a subject then before the town, in which the defendant was interested as a qualified voter. *Dodds v. Henry*, 9 Mass. Rep. 262.]

(2) [Great allowance is to be made for what a man says when attending the trial of his own cause. He has a right to the utmost freedom in communicating his sentiments to his counsel, or the court; but he may not make this privilege a cover for malicious slander. *Vigours v. Palmer*, 1 Browne's Rep. 40. *Swearingen v. Birch*, 4 Yeates, 322.

Where a party in court said to a witness, who had just finished his testimony, "you have sworn to a manifest lie;" the words were held actionable, in Pennsylvania. *Kean v. McLaughlin*, 2 Serg. &

Court want jurisdiction (a), and, as it seems, where the process was also improper (b); or upon an application made in the usual course to a magistrate or peace officer (c); or in the course of offering a petition to the King (d), or parliament (e), or to a committee of the House of Commons appointed by the Commons to hear and examine grievances (f) (3). But the defence would fail if it ap-

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(a) *Buckley v. Wood*, 4 Co. 14.

(b) 1 Vin. Ab. 389. 2 Lutw. 1571. *Contra, Buckley v. Wood*, 4 Co. 14.

(c) *Ram v. Lamley*, Hutt. 113; see also *Barbaud v. Hookham*, 5 Esp. C. 109. *Johnson v. Evans*, 3 Esp. C. 32. [*Burton v. Worley*, 4 Bibb, 38. *Shock v. M'Chesney*, 4 Yeates, 507. S. C. 2 Browne's Rep. Appx. 64.]

(d) *Hare v. Meller*, 3 Lev. 169; see also 4 Co. 14. The defendant wrote a letter to the Secretary of War, with intent to prevail upon him to grant his authority to compel the plaintiff, an officer in the army, to pay the defendant a debt due to him, and not for the purpose of slander; and although the letter contained expressions derogatory of the plaintiff's character, yet it was held that the defendant might go into evidence, under the plea of the general issue to prove the truth of the facts which he had stated, in order to show that he had acted *bona fide*, *Fairman v. Ives*, 5 B. & A. 642.

(e) See the resolutions of the House of Commons in *Kemp v. Gee*, 9 Feb. 8 Will. III. in which it was declared, that all petitions to the House of Commons were lawful, or at least punishable by themselves only.

(f) *Lake v. King*, 1 Saund. 131. 1 Lev. 241. 1 Mod. 58. 1 Sid. 414.

Rawle, 469. So in New York, to say to a witness, while giving his testimony to a material point in a cause, "that is false," is actionable, if spoken maliciously. *M'Claghry v. Wetmore*, 6 Johns. 82. But in New Jersey, if a party, in the progress of a trial, and in open court, speaking of the testimony of a witness, say "it is a lie and I can prove it," it is not actionable. *Badgley v. Hedges*, 1 Penn. Rep. 233. See *Steele v. Southwick*, 9 Johns. 214.

If a party, in the course of his argument say that he will prove the testimony of the other to be false, he will not be liable, although he fail in the proof. *Kean v. M'Laughlin*, *ubi sup.*

If an attorney introduce slanderous matter into the pleadings of a cause, without the direction of his client, the latter is not responsible. *Hardin v. Cumstock*, 2 Marsh. 481.

Words spoken of the plaintiff by the defendant, before a Presbytery of the Presbyterian Church, in the course of his defence against charges for which he had been cited there by the plaintiff, are not actionable, if he do not designedly and maliciously wander from the point, for the purpose of slander. *M'Millan v. Birch*, 1 Binney, 178. See Mr. Howe's note to *Fowler & ux. v. Homer*, 3 Camp. 296.]

(3) [No action will lie for words contained in a petition for redress of grievances, whether the subject matter of the petition be

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peared that the mode or * extent of the publication was not warranted by the usual course of proceeding in such cases.

In the case of *Lake v. King*, the main question was not whether the exhibiting the petition to parliament was lawful, or not, but whether the defendant was warranted in printing his petition, and delivering copies to members of a committee of the House of Commons, and it was decided for the defendant, on the ground that such a publication was according to the order and course of proceeding in parliament (g). It follows, that had he practised a mode of publication, unwarranted by the usual course of proceeding, or by the necessity of the case, this defence would not have availed him (h).

So it is a bar to the action, that the words suggesting particular facts, though false, were spoken by the defendant in the course of his duty as an advocate, provided

(g) 1 Lev. 241; 1 Mod. 58; 1 Sid. 414; of which, it was said the Court would take notice.

(h) Ibid; and see *Brown v. Croome*, 2 Starkie's C. 297. *supra*, 868.

true or false, simply on its being preferred to either branch of the legislature, or disclosed to any of its members. *Harris v. Huntington & al.* 2 Tyler, 129. Hence charges alleged against the plaintiff, and addressed to the legislature of Vermont, for the purpose of preventing his reappointment to the office of justice of the peace, were held not to be actionable, and judgment was arrested; *Ibid.* 1 Tyler, 164. So where false charges were preferred to the council of appointment, in New York, against a public officer, praying for his removal from office, it was held that no action would lie, unless the petition were proved to be malicious and groundless, and presented merely to injure the plaintiff's character—and as it seems, no action would lie, whether the statement in the petition were true or false, or the motives innocent or malicious. *Thorn v. Blanchard*, 5 Johns. 508, in the Court of Errors, reversing the judgment of the Supreme Court, and against the opinion of the Chancellor. In Pennsylvania, however, accusations preferred to the governor against the character of public officers, are held to partake of the nature of judicial proceedings, and are actionable, if they originate in malice and are without probable cause—of which the jury are to judge. *Gray v. Pentland*, 2 Serg. & Rawle, 23. *Same parties*, 4 ib. 420. And the burden of proving malice and want of probable cause is on the plaintiff, as in an action for malicious prosecution. 4 Serg. & Rawle, *ubi sup.*

It is no justification, that the defendant signed a libellous address as chairman of a public meeting of citizens, convened for the purpose of deciding on a proper candidate for the office of governor, at an approaching election, and that it was published by order of such meeting—although the plaintiff was a candidate whose election the address was intended to thwart. *Lewis v. Faw*, 5 Johns. 1.]

they were *pertinent to the subject*, and were suggested by the client (i). And it will, it seems, be presumed till the contrary appear, that the fact was suggested in the brief (k). And no comment by the advocate upon the facts proved in evidence, or epithets used in commenting upon those facts, if the observations relate to the cause, will be actionable (l). Proof in defence.

Where the alleged libel consists in a faithful report of a judicial proceeding, if the occasion in point of law amount to a justification, there seems to be some doubt whether it would be evidence under the general issue (m). * But it is by no means a general rule, that even a correct report of parliamentary or judicial (n) proceedings (o) will furnish a legal defence to an action or indictment (1). * 876

An *ex parte* statement of the evidence on a criminal charge before a magistrate (p) or coroner (q), cannot be justified, for such publications tend to deprive the accused of the benefit of a fair and impartial trial. So the publication of such an account will not be justifiable if it con-

(i) *Brook v. Sir Henry Montague*, Cro. J. 90.

(k) *Wood v. Gunston*, Style, 462.

(l) *Hodgson v. Scarlett*, 1 B. & A. 232; as to mere words of opinion, see Com. Dig. action on the case for defamation, F. 13.

(m) *Curry v. Walter*, 1 B. & P. 525; where such evidence was admitted under the general issue; but after a verdict for the defendant, it was objected, in arrest of judgment, that such evidence had been improperly received under that issue; but the case stood over, and no judgment was ever given. In the subsequent cases of *Astley v. Yonge*, Burr. 807, and *Styles v. Nokes*, 7 East, 493, the defence was pleaded specially. So also in *Lewis v. Clement*, 3 B. & A. 702.

(n) *R. v. Creevy*, 1 M. & S. 273.

(o) See the observations of Ld. Ellenborough, C. J. and Grose, J. in *Styles v. Nokes*, 7 East, 493; and *R. v. Creevy*, 1 M. & S. 273. See *R. v. Lofield*, 2 Barnard. 128; and *qu.* whether the defendant can justify the publication of a judicial proceeding, which is defamatory of one who is not a party to the suit, nor present at the inquiry. *Lewis v. Clement*, 3 B. & A. 702.

(p) *R. v. Lee*, 5 Esp. C. 123. *R. Fisher*, 2 Camp. 563.

(q) *R. v. Fleet*, 1 B. & A. 379.

(1) [A correct publication of the proceedings of a court of justice is not an indictable offence, unless it is intended to serve as a vehicle to convey slanderous charges, and to gratify a malicious purpose; in which case it is libellous and indictable. *The State v. Lehre*, 2 Const. Rep. 809. But if the publisher discolor or garble the proceedings, or add comments and insinuations of his own, in order to asperse the character of the parties concerned, it is libellous and actionable. *Thomas v. Crowell*, 7 Johns. 264.]

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tain matter of a scandalous, blasphemous, or indecent nature (r).

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The defendant may prove, by way of defence, under the general issue, that the publication was procured by the contrivance of the plaintiff for the purposes of the action (s), for the latter cannot complain of that as an injury which he has willingly occasioned. The truth of the publication is not admissible in evidence in bar of the action, even to disprove the malice (t); proof that the plaintiff has been in the habit of libelling the * defendant is no bar to the action, but is, it is said, evidence in mitigation of damages (v) (1).

In mitigation.

The defendant may also prove accord and satisfaction under this issue. The plaintiff had agreed to wave his right of action, in consideration that defendant would destroy certain documents, which the defendant accordingly did, and evidence of this was held to be admissible as an accord and satisfaction under the general issue (u).

The defendant may under the general issue prove in mitigation of damages, that the plaintiff at the time of the publication laboured under a general suspicion of having

(r) *R. v. Mary Carlile*, 3 B. & A. 167.

(s) *King v. Waring & ux.* 5 Esp. C. 13. See also *Smith v. Wood*, 3 Camp. 323, where the defendant showed to the witness, at the request of the latter, a caricature of the plaintiff, and it was held that this was not sufficient to support the action, *tam. qu.* for it does not appear that the witness had been sent by the plaintiff.

(t) *Underwood v. Parks*, 2 Str. 1200. [*Barns v. Webb*, 1 Tyler, 17. *Alderman v. French*, 1 Pick. 1. *Cook v. Barkley*, 1 Penn. Rep. 169. *Bailey v. Hyde*, 3 Conn. Rep. 463.]

(v) *Finnerty v. Tipper*, 2 Camp. 76.

(u) *Lane v. Applegate*, 1 Starkie's C. 97.

(1) [In an action for a libel, the defendant may give in evidence a former publication by the plaintiff, to which the libel was an answer, to explain the subject matter, occasion, and intent of the defendant's publication, and in mitigation of damages: But such prior publication by the plaintiff, though a libel on the defendant, does not amount to a justification. *Hotchkiss v. Lothrop*, 1 Johns. 286. *S. P. Thompson v. Boyd*, 1 Rep. Con. Ct. 80.

Under the general issue, the defendant cannot, in an action for words spoken, give evidence to prove the general character of the plaintiff, as an insulting, provoking and quarrelsome man, and that before the speaking of the words, the plaintiff was in the habit of vilifying and insulting the defendant and his family. *M'Alexander v. Harris*, 6 Munf. 465. *S. P. Walker & Wins*, 8 Mass. Rep. 248.]

been guilty of the charge imputed by the words (x) (2). For it is material to know what character the plaintiff possessed, in order to ascertain the injury which has been sustained (y).

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It has been said that any evidence short of such as would be a complete defence to the action, had a justification been pleaded, is admissible, in mitigation of damages (z); and accordingly in an action for a libel, charging the plaintiff with being concerned with one Knowles in procuring money from the friends of a capital convict, under the pretence of being able to procure a pardon, through the medium of the Duke of Portland, evidence was admitted, under the plea of * the general issue, of an admission by the defendant, that he had received money for conveying a let- * 878

(x) *Earl of Leicester v. Walter*, 2 Camp. 251, Cor. Mansfield, C. J. — *v. Moor*, 1 M. & S. 284. Note, that in these cases there were general allegations of the plaintiff's previous good character, and of the loss of character sustained by reason of the words.

(y) *Vide supra*, 369; and *Williams v. Callender*, Holt's C. 307.

(z) *Knobell v. Fuller*, sittings after Trin. T. 1797, per Eyre, C. J.; and the case of *Curry v. Walter*, was referred to, in which it was said that his lordship had received similar evidence; but it seems that in that case the evidence was received in bar of the action, and to show that the defendant had merely published a report of proceedings in a court of justice.

(2) [In Connecticut and Massachusetts, a defendant is not permitted to give in evidence, in mitigation of damages, reports by others that the plaintiff is guilty of the crime charged. *Lewis v. Niles*, 1 Root, 346—*Alderman v. French*, 1 Pick. 1. *Wolcott v. Hall*, 6 Mass. Rep. 514. *Aliter*, in New Jersey. 1 Penn. Rep. 169, *Cook v. Barkley*—one judge dissenting.

In Kentucky, the general currency of a report is not a justification of slander; but evidence of general reputation is admissible in extenuation of malice and mitigation of damages. *Calloway v. Middleton*, 2 Marsh. 372.

Where the defendant, at the time of speaking the words, knows they are not true, and afterwards, with the same knowledge, pleads their truth in justification; no evidence whatever ought to be received in mitigation of damages. *Larned v. Buffinton*, 3 Mass. Rep. 546.

See *Ante*, p. 369, note (1).

In Virginia, evidence of circumstances of suspicion, not amounting to a full justification, is not admissible under the general issue, in mitigation of damages. *M^r Alexander v. Harris*, 6 Munf. 465. (See *Cheatwood v. Mayo*, 5 Munf. 16, where this point was discussed but not decided.) *Secus*, in South Carolina and Connecticut; *Burford v. M^r Luny*, 1 Nott & M^cCord, 268.—*Bailey v. Hyde*, 3 Conn. Rep. 463. And also, *semb.* in Pennsylvania. *Williams v. Mayer & al.* cited 1 Binney, 92. n.]

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ter to the Duke (1). To admit such evidence would however be a violation of the rule established in *Underwood v. Parks* (a), where it was agreed by all the Judges that evidence of the truth could not be admitted, either in bar of the action, or in mitigation of damages, unless it were pleaded. For if facts tending to prove the truth of the charge were to be admitted in mitigation of punishment, how would it be possible to draw the line, and stop short of actual conviction (b).

In a late case the defendant was allowed to inquire

(a) 2 Str. 1200; and see *Mullett v. Hulton*, 4 Esp. C. 248.

(b) See Starkie's L. Libel, 456; and see *Mills v. Spencer*, Holt's C. 534, where Gibbs, C. J. observed, that "general reports have been admitted in mitigation of damages, but not the specific facts."

(1) [In an action of slander for saying of the plaintiff, a deputy postmaster, that "he never sent from his office a treasury note," which had been enclosed in a letter and put into his office directed to a third person—but that "he had stolen it;" the defendant was not allowed, under the general issue, to prove, that before the speaking of the words, the plaintiff said "the treasury note never left his office"—and that after speaking the words the plaintiff said "his brother J. S. was the author and first promulgator of the story. *Bailey v. Hyde*, 3 Conn. Rep. 463. In a suit for calling the plaintiff a thief, and saying that he had stolen the defendant's spar, the defendant cannot give in evidence, in mitigation of damages, the record of a former action of trespass, in which he had recovered damages against the plaintiff for maliciously taking away the spar. *Watson v. Churchill*, 5 Day, 256. In an action for a libel, the defendant cannot give in evidence, to reduce damages, a former recovery of damages against him, by the plaintiff in another action for a libel which formed one of a series of numbers published in the same gazette, and containing the libellous words charged in the declaration in the second suit. *Tillotson v. Chedham*, 3 Johns. 56. Evidence of declarations by a defendant, made after suit brought, that he did not mean to charge the plaintiff with the actual fact, and that the words were spoken in the heat of passion, is not admissible under the general issue. *McAlexander v. Harris*, 6 Munf. 465. Nor can the defendant show that he has been in the habit of relating the circumstances in a manner different, in some essential respects, from that charged in the declaration—though he has first proved that such relation of the circumstances was true. *Wills v. Church*, 5 Serg. & Rawle, 190. Nor can he give in evidence, either in bar or in mitigation of damages, any other crime than the one charged. *Andrews v. Vanduzer*, 11 Johns. 38. *Sawyer v. Eifert*, 2 Nott & McCord, 511. In an action for charging the plaintiff with perjury, the defendant cannot give evidence, for the purpose of reducing damages, that the plaintiff holds atheistical opinions, and disbelieves the existence of a future state of being. *Ross v. Lapham*, 14 Mass. Rep. 275. See *Post*, 880, note (1).]

whether the witness had not read the substance of the alleged libel in a public newspaper (c).

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General evidence of bad character seems to be admissible, although the defendant has justified that the imputation is true, for if the justification should fail the question as to the quantum of damages would still remain (d) (2). Proof in mitigation.

Where the defendant has in his libel referred to the

(c) *Wyatt v. Gore*, 1 Holt's C. 303; and *supra* note (t).

(d) *Supra*, 369. In the case of *Hunt v. Stevens*, Exch. Trin. Term. 1822, it was held, that, in an action against the plaintiff for slandering him in his profession as an attorney, a witness could not be examined as to the plaintiff's bad character as an attorney; in the case of *Waithman v. Weaver*, 1 D. & R. 10. Abbott, C. J. held, that although the defendant might give in evidence rumours against the plaintiff's character, in order to show that he had sustained no injury, he could not give facts in evidence. In the case of *Ellershaw v. Robinson & ux.* Lanc. Sp. Ass. 1824, in an action for slander spoken by the wife, charging the plaintiff, a widow, with an adulterous intercourse with the other defendant, Robinson, from which special damage had been sustained; plea, the general issue; Holroyd, J. held that it would have been competent to the defendants to have gone into general evidence, to impeach the plaintiff's character for chastity.

(2) [The Sup. Court of New York, in the case of *Foot v. Tracy*, 1 Johns. 46, were divided on the question whether in an action for a libel the defendant can give in evidence, under the general issue, the general character of the plaintiff, in mitigation of damages. It has, however, been since decided that such evidence is admissible, in an action for words spoken. *Paddock v. Salisbury*, 2 Cowen, 811. See also *Springstein v. Field*, Anthon's N. P. 185. Similar decisions have been made in Connecticut, North Carolina and South Carolina. *Brunson v. Lynde*, 1 Root, 354. *Seymour v. Merrills*, *ibid.* 459. *Austin v. Hanchet*, 2 Root, 149. *Vick v. Whitfield*, 2 Hayw. 222. *Buford v. McLuny*, (two judges dissenting) 1 Nott & M'Cord, 268. *Sawyer v. Eifert*, 2 *ib.* 511. The same doctrine is held in Massachusetts, (*Larned v. Buffinton*, 3 Mass. Rep. 546: *Wolcott v. Hall*, 6 *ib.* 514: *Ross v. Lapham*, 14 *ib.* 275) subject to the limitations mentioned *Ante*, Vol. I. p. 369, note (1) & *supra*, 877, note (2) where there has been an unsuccessful plea in justification—So also, it seems in Kentucky. See *Calloway v. Middleton*, cited. p. 877 note (2). In Vermont this doctrine is rejected. *Smith v. Shumway*, 2 Tyler, 74.

The plaintiff may give in evidence his own rank and condition in life, for the purpose of enhancing damages. *Larned v. Buffinton*, *ubi sup.* But he cannot give evidence of his having always sustained the reputation of an honest man, in order to rebut evidence adduced by the defendant to establish the truth of specific charges of official misconduct in the plaintiff. *Stow v. Converse*, 3 Conn. Rep. 325. Whether in an action for a libel, the plaintiff may show, for the purpose of enhancing damages, that the defendant has been indemnified for the publication?—*quære.* *Hotchkins v. Lothrop*, 1 Johns. 286. *Dole v. Lyon*, 10 Johns. 447.]

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source from which he derived the information, he may, although he has not justified, prove, under the general issue, in mitigation of damages, that he did in fact so receive the information (e): As where the libel refers to a newspaper as the medium of communication (f).

Justification.

As the truth, when offered as a defence in bar of an action for slander or libel, must be specially pleaded, the evidence of course must be governed by the specific * 879 * allegations upon the record (1). There seems to be little, if any, difference between the evidence in proof of a specific charge thus involved in a civil proceeding, and the evidence which is essential to support an indictment for a similar charge (g). It may happen, indeed, that greater precision may be necessary in the former case than in the latter, and that a variance as to sums or magnitudes, which would not be fatal upon an indictment, would be so upon issue taken on a justification in slander, for there the defendant may, by the specific nature of the charge which he has made, with which his plea must correspond, be bound to prove it with equal precision.

An acquittal of the plaintiff on an indictment charging him with the same offence as is specified in the plea of justification, does not preclude the defendant from proving the truth of the charge (h); and, in strictness, is not evidence at all (i). It seems that the general good character of the plaintiff is evidence to rebut the presumption of guilt (k) (2).

(e) *Mullett v. Hulton*, 4 Esp. C. 248. [See *Coleman v. Southwick*, 9 Johns. 45.]

(f) 4 Esp. C. 248; and see *R. v. Burdett*, 3 B. & A. 717.

(g) *Cook v. Field*, 3 Esp. C. 133. [*Dwinells v. Aikin*, 2 Tyler, 75.]

(h) *England v. Bourke*, 3 Esp. C. 80.

(i) *Supra*, Vol. I, p. 219.

(k) *Vide supra*, 367.

(1) [A defendant who would justify a charge made by him, must justify the specific charge laid, and cannot set up a charge of the same kind but distinct as to subject matter. *Sawyer v. Eifert*, 2 Nott & M'Cord, 511. *Matthews v. Davis*, 4 Bibb, 173. *Andrews v. Vanduzer*, 11 Johns. 38. See also *Shepard v. Merrill*, 13 Johns. 475. *Van Ness v. Hamilton & al.* 19 Johns. 349. *Brooks v. Bemis*, 8 Johns. 455. *Biggs v. Denniston*, 3 Johns. Cas. 198. *Genet v. Mitchell*, 7 Johns. 120. See *Ante*, p. 369, note (3).]

(2) [The insanity of the defendant, at the time of speaking the words, will be received in evidence as an excuse, where it is such that the words would produce no effect on the hearers. *Aliter*, where it is slight and not uniform. In the latter case the plaintiff

Where the defendant justifies, alleging that he heard the words from another, and mentioned the author when he published them, the proof depends upon the form of the issue taken (l). Upon issue taken on the general replication *de injuria sua propria*, the *onus* of proving the facts, that he heard the very words spoken by the third person, as alleged in the plea, and that, on repeating them, he gave up his author, lies on the defendant, for the object of the plea is to show that the defendant has afforded to the * plaintiff a certain cause of action against another (m) it * 880 would not be sufficient under this issue to prove that the third person spoke words to the same effect with those laid (n) (1).

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Justification.
Hearsay.

(l) This defence cannot be set up under the plea of the general issue. *Mills v. Spencer*, Holt's C. 534.

(m) See *Ld. Northampton's case*, 12 Co. 132. *Crawford v. Middleton*, 1 Lev. 82. *Maitland v. Goldney*, 2 East, 425. *Woolnoth v. Meadows*, 5 East, 463. [See *Bell v. Byrne*, 13 East, 554.]

(n) 2 East, 425.

is entitled to damages according to the injury. *Dickinson v. Barber*, 9 Mass. Rep. 225.

In *Horner v. Marshall's Admr.* 5 Munf. 466, it was held to be a sufficient ground of equity for a perpetual injunction to a judgment in slander, that at the time of speaking the words, and when the judgment was obtained, the defendant was insane, or in a state of partial mental derangement on the subject, to which those words related.]

(1) [Whether a person who repeats a slander, but who at the same time names the person from whom he received it, may plead that circumstance in justification, seems to depend on the *quo animo* with which the words, with the name of the author, are repeated. They may be repeated with a malicious intent, and with mischievous effect. The public may be ignorant of the worthlessness of the original author, and may be led to attach credit to his name and slander, when both are mentioned by a person of undoubted reputation. Per Kent, C. J. 10 Johns. 449, *Dole v. Lyon*. S. P. Per *Ld. C. J. Abbott*, *Holroyd and Best, Js.* 4 B. & A. 611. 614. 615, *Lewis v. Walter*. There is no case in the English books, in which this justification has been allowed, under any circumstances, in an action for a libel; and Kent, C. J. and *Ld. C. J. Abbott*, and *Best, J.* in the cases above cited, strongly intimated that such a defence is not applicable to written slander.

In South Carolina, it is held that where a person affirms the truth of the words, he is liable, although he adds that he heard them from another; as where the defendant said of the plaintiff, "he stole a cart," but added, "I heard it from J. S." *Miller v. Kerr*, 2 M'Cord, 285. S. P. in Connecticut. *Austin v. Hanchet*, 2 Root, 148. The court in S. Carolina seemed to hold that a person might justify the utterance of actionable words, if at the time of speaking them he named the person of whom he heard them, and if in truth

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Libel.
Indictment.

II. Upon an *indictment* for publishing a libel, the prosecutor must prove, 1st, The fact of *publication*. 2dly, The introductory *averments* and the *innuendos* (o). 3dly, The *malicious intention* of the defendant.

1st. The evidence of publication has already been ad-

. (o) *Vide supra*, 859.

he did hear them—but that such justification is admissible only so far as it is evidence of the want of malice.

- In *Dole v. Lyon*, ubi sup. the publisher of a libel was held responsible to the party libelled, though the libel was accompanied with the author's name.

In Pennsylvania, it has been held, that if a libel is republished innocently, and without malice, the person so republishing shall be excused, if at the time of republication he gives the true source of his information, so as to afford the injured party an opportunity of bringing his action against the real libeller. *Bians v. McCorkle*, 2 Browne's Rep. 90. *Aliter*, if there be malice and an intention to injure. *ibid.* (*Quære*, is he who *originally* publishes libellous matter "innocently, and without malice," liable to an action?) In the same case the rule as to oral slander is stated to be, that if the words are uttered generally, the defendant cannot justify by giving the name of the author in his plea, or at the trial; it can then only go in mitigation of damages; but if at the time he repeats the words, he gives the name of the author, so that the party may have his action against him, it is a justification. But in *Hersh v. Ringwalt*, 3 Yeates, 508, it is said, if the authority is mentioned at the time the words are uttered, it should be such an authority as would induce reasonable belief. In *Kennedy v. Gregory*, 1 Binney, 85, where the proof in an action of slander was, that the defendant, in reply to a question implicating the plaintiff, said, "it is so," or "they say it is so;" it was held (one judge dissenting) that the defendant might give in evidence, to reduce damages, that A. B. told him what he related. So in *Leicester v. Smith*, 2 Root, 24, it was held that the defendant might show, in mitigation of damages, from whom he heard the story.

In an action for a libel against the printer of a newspaper, it is not a justification that the publication was made at the instance of a person whose name was given at the time, and who paid for it in the usual course of business—though it may go in mitigation of damages. *Runkle v. Meyer & al.* 3 Yeates, 518. So evidence of a writing purporting to be the copy of an anonymous letter, which appeared to have been sent to the preceding editor, was ruled to be admissible in mitigation of damages, to show that the defendant was not the original inventor of the charge. *Morris v. Duane*, 1 Binney, 90. n. So the defendant may give evidence of the authority from which he received a libel which he has published—to reduce damages. *Romayne v. Duane*, Circuit Court, April 1814. Wharton's Digest, 419.

A letter, stating that the writer had heard of a slanderous report, is good evidence to prove the circulation of the report, and may be read for that purpose—the hand-writing of the person being proved—but it is inadmissible to prove that the defendant propagated the report. *Schwartz v. Thomas*, 2 Wash. 167.]

verted to. In the case of indictment, a publication to the prosecutor himself is, as has been seen, sufficient to constitute the offence, on the ground of its tendency to produce a breach of the peace, although a publication to the plaintiff alone would not support an action, since without some further publication no detriment can have resulted to the plaintiff (*p*). The defendant may be found guilty of the publishing, and acquitted of the composing or printing of a libel, where both are conjunctively alleged (*q*).

3dly, Many of the observations which have been already made (*r*) apply to the proof of malice. Malice is essential to the offence (*s*), and of the existence of malice the jury are to judge. The defendant's malice consists in his intention to effect the particular mischief; and, as in all other cases, what he intends must be inferred from what he does. If nothing appear * from which the intention is to be collected, except the publication of the libel itself, unexplained by any context of circumstances, if the very terms of the document itself tend to scandalize, degrade and injure the individual, or to excite to acts of outrage and sedition, the intention on the part of the defendant to effect those objects must necessarily be inferred, without the aid of any extrinsic proof (*t*). * 881

The defendant may in his turn rebut the inference of malice by evidence; he may show that he delivered the libel as the innocent agent of another, being himself ignorant of its contents; or that it was published by an agent without his knowledge or authority (*u*); or that he delivered it by mistake (*x*); or give in evidence any circumstances which show that what he did was done in the fair and honest discharge of any duty to society, or even that he acted *bona fide* in the prosecution of any claim, where he supposed himself entitled to a remedy, or to possess an in-

(*p*) *Supra*, 845.

(*q*) *R. v. Hunt & another*, 2 Camp. 583. *R. v. Hart*, 10 East, 94, *qu.* *R. v. Williams*, 2 Camp. 646, Cor. Lawrence, J. As where the record varies from the printed libel, but agrees with the manuscript delivered by the defendant to the printer. *Ibid*; and *R. v. Burdett*, 3 B. & A. 717. *Supra*, 855.

(*r*) *Supra*, 861.

(*s*) *R. v. Hart*, 1 Bl. R. 386. *R. v. Paine*, 5 Mod. 167.

(*t*) *Vide supra*, 739. 862; and *R. v. Creevy*, *supra*, 862; and 1 M. & S. 273. *R. v. Burdett*, 4 B. & A. 95.

(*u*) *R. v. Almon*, 5 Burr. 2686. *Supra*, 650.

(*x*) *Per Cur.* *R. v. Paine*, 5 Mod. 163.

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Proof in defence.

terest (*y*). Where the alleged libel is contained in a newspaper, the defendant has a right to have other parts of the same paper, connected with the subject-matter read in evidence, although they are contained in a different part of the paper (*z*). The defendant may also give in evidence any matter in defence which negatives any of the material allegations contained in the indictment. It is no defence to show that the same libel had already been published by another (*a*); neither is the defendant permitted to give the truth of the libel in evidence (*b*) (1), * but he may disprove the fact of publication, or negative the material facts averred, or the truth of the innuendos; as by evidence which shows that the matter published did not relate to the party or subject-matter alleged in the indictment (*c*).

* 882

In a late instance a defendant was allowed to prove that he had stopped the sale of a libellous publication with a view to mitigation of punishment in case of conviction, and

(*y*) 4 Bl. Comm. 151; 5 Co. 125; Starkie on Libel, 557, and the cases there cited.

(*z*) *R. v. Lambert & Perry*, 2 Camp. 398.

(*a*) *R. v. Holt*, 5 T. R. 436.

● (*b*) 4 Bl. Comm. 151. 5 Co. 125. And see the cases cited Starkie on Libel, 557.

(*c*) *R. v. Horne*, Cowp. 672. 675.

(1) [*The State v. Lehre*, 2 Const. Rep. 809. *acc.* Though the truth of the words is not a justification in a criminal prosecution for a libel, yet the defendant may repel the charge, by proving that the publication was for a justifiable purpose and not malicious, nor with the intent to defame. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame. He who consents to be a candidate for a public elective office puts his character in issue, so far as it respects his fitness and qualifications for the office—and publications of the truth on this subject, with the honest intention of informing the people, are not punishable as libels: And every man holding a public elective office is within this principle. But the publication of falsehood and calumny against public officers, or candidates for office, is a gross punishable offence. *Commonwealth v. Clap*, 4 Mass. Rep. 163. See also *Respublica v. Dennie*, 4 Yeates, 267. See *Dodds v. Henry*, cited *supra*, 874, note (1).

In the case of *The People v. Crosswell*, 3 Johns. Cas. 337, the Sup. Court of New York were divided on the question whether the truth could be given in evidence; but a statute was afterwards passed by the legislature of that State, authorizing the admission of such evidence. It is now a constitutional right in that and several of the States, and secured by statutes in others—subject to different degrees of limitation.]

to avoid the expense of bringing the fact before the court, by affidavit (*d*).

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By the stat. 32 Geo. 3. c. 60, it is declared and enacted, that upon a prosecution for libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue; and by the second section it is provided, that the court or judge shall, according to their or his discretion, give their or his opinion to the jury on the matter in issue, *as in other criminal cases*. The effect of this statute seems to be simply that of placing the trial for a libel upon the same footing with trials for any other offence, by removing an anomaly which before existed. The statute does not require that the court shall advance any opinion upon the case, except such as is given at the discretion of the court in parallel cases. The offence consists of certain *facts* done, and the *intention* with which they were done. Whether the *facts* be proved is in all cases for the consideration and decision of the jury, aided by the advice of the court in doubtful cases, as to the weight of evidence.

Effect of the st.
32 G. 3. c. 60.

Whether a particular publication be so far noxious in its bearing and tendencies as to amount in the abstract to a *libel*, is a pure question of law, just as *much as it is a question of law what will constitute an assault. If the publication in consideration of law be libellous, then it is a question of fact for the jury, whether it was wilfully and maliciously published, subject, however, to the ordinary presumption of law, that in the absence of proof to the contrary, a man intends that which is the natural consequence of the means which he employs. It follows that neither the jury nor the parties have a right to expect from the court any specific and direct opinion upon the *whole* of the case, or any other than that which is ordinarily given at the discretion of the court to the jury in parallel cases, with respect to the verdict which they ought to find, in point of law, as dependent and contingent upon their conclusions in point of fact, drawn from the alleged libel itself, and all the circumstances of the case, as to the meaning, motives, and intention of the defendant (*c*).

* 883

LIEN.

THE evidence to establish a right of lien is either of an

(*d*) *R. v. Hone*, Cor. Ld. Ellenborough, Guildh. sittings after Hil. T. 1817; but *semble*, this is entirely *ex gratia*.

(*c*) See *R. v. Holt*, 5 T. R. 436. *R. v. Burdett*, 4 B. & A. 95.

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express agreement between the parties in the particular instance, or is *presumptive*, being founded either upon the mode of dealing between the same parties in former instances, or on the *general usage and custom* of the particular trade.

Proof of by
express agree-
ment.

1st. An agreement amongst the members of a particular trade or business to insist upon a lien for their general balance, is legal, and is binding upon all those to whom notice of their terms of dealing has been communicated (*d*).

* 884
Notice.

In such a case it is necessary to prove * that the employer had notice of the special terms; it is not sufficient to prove that general notice was given by advertisement in the public newspapers, or otherwise, without further showing, by reasonable evidence, that the party to be affected by it read the notice (*e*).

Presumptive
evidence.

2ndly. The *presumption* from former dealings rests upon the general principle, that the parties intended to deal, in the particular instance, upon the same terms on which they had dealt on former occasions, in the absence of any reason for supposing that they intended in that instance either to deal independently of any contract (*f*), or to adopt a fresh one.

Proof. Gene-
ral usage of
trade.

3dly. By evidence of a general usage in the particular trade, collected from the dealings of other persons engaged in the same employment, of such notoriety that the inference may fairly be drawn, that the parties knew the usage, and adopted it in the particular instance, intending to deal as all others did, according to the known usage of trade. It is a question for a jury in such cases, whether the usage has been so general that the parties must be taken to have acted upon it (*g*).

The nature and force of the evidence requisite for this purpose has been already adverted to (*h*). The custom

(*d*) *Kirkman v. Shawcross*, 6 T. R. 14; and see *Oppenheim v. Russel*, 3 B. & P. 42. It has been doubted whether inn-keepers, common carriers, &c. can, by notice, entitle themselves to a lien for the general balance. *Ibid.* But it is settled, that carriers at least may do this, as they are in the constant habit of making special contracts in opposition to their common-law liability. And see *Rushforth v. Hadfield*, 7 East, 224; 6 East, 519.

(*e*) *Vide supra*, *Carriers*, 338; and *infra*, *Partners*.

(*f*) *Supra*, Vol. I, p. 35; Vol. II, p. 57. *Kirkman v. Shawcross*, 6 T. R. 14. 19. *Downam v. Matthews*, Prec. Chan. 580. *Demainbray v. Metcalfe*, 2 Vern. 691. 698.

(*g*) See *Rushforth v. Hadfield*, 7 East, 224, and Ld. Ellenborough's observations there.

(*h*) *Supra*, 452-3.

must be proved by means of witnesses who have had actual and frequent experience of the custom (i). PART
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Where the claim attempted to be established is contrary to the general law of the land, the proof is, it is said, to be watched with jealousy (k). Proof of general usage.

* Where a carrier claimed a lien for his general balance, and many instances were proved in which the right had been insisted upon, and acquiesced in within 10 or 12 years back, and one case in which the same had been done 30 years ago, and evidence was also given that this had been the *general practice* in the North (where the contract arose), for 20 or 30 years, it was left to the jury to decide whether the usage was so general as to warrant them in presuming that the party employing the carrier knew it, and intended to contract in conformity with it. The jury by their verdict negatived the right of lien, and the court of King's Bench afterwards refused a new trial (l). * 885

Where the right to insist upon a general lien has frequently been established by evidence, the custom becomes part of the law of the land, and the courts will not afterwards permit it to be disputed (m).

(i) Ibid.

(k) See *Rushforth v. Hadfield*, 7 East, 224.

(l) Ibid.

(m) *Naylor v. Mangles*, 1 Esp. C. 109. *Spears v. Hartly*, 3 Esp. C. 81. *Supra*, 452. It seems that all tradesmen have a particular lien. See *ex parte Deeze*, 1 Atk. 228. As to the lien of an attorney, see 12 Mod. 554. *Mitchell v. Oldfield*, 4 T. R. 123. *Ex parte Nisbitt*, 2 Scho. & Lef. 279. 115. 15 Ves. jun. 72. 297. 16 Ves. jun. 164. 13 Ves. jun. 161. 195. 14 Ves. jun. 271. *Alger v. Heford*, 1 Taunt. 38. Doug. 104. 1 Ld. Raym. 738. *Hoare v. Parker*, 2 T. R. 376. 8 Mod. 306. *Welsh v. Hole*, Doug. 226. *Read v. Dupper*, 6 T. R. 361. *Griffin v. Eyles*, 1 H. B. 122. *Pyne v. Erle*, 8 T. R. 407. *Ormerod v. Tate*, 1 East, 464. *Glaister v. Hewer*, 8 T. R. 70. 1 H. B. 23. 217. 2 N. R. 99. 1 N. R. 22. [Yelv. 67. and note.] Of bankers, for their general balance, *Jourdain v. Lefevre*, 1 Esp. C. 66. *Davis v. Bowsher*, 5 T. R. 488. *Savill v. Barchard*, 4 Esp. C. 53. *Bosanquet v. Dudman*, 1 Starkie's C. 1. Calico printers for a general balance, *Weldon v. Gould*, 3 Esp. C. 268. *Ex parte Andrews*, Co. B. L. 429. Of carriers, for a lien on the particular goods, *Rushforth v. Hadfield*, 6 East, 519. 7 East, 224. *Aspinall v. Hickford*, 3 B. & P. 44, n. *Oppenheim v. Russel*, 3 B. & P. 42. 6 T. R. 14. By water, *Butler v. Woolcot*, 2 N. R. 64. *Abbott*, 112. 215. 244. 1 Esp. C. 23. 13 East, 402. Dyers, for a particular lien, *Kirkman v. Shawcross*, 6 T. R. 14. *Clarke v. Gray*, 4 Esp. C. 178. Factors, to a general lien, *Kruger v. Wilcox*, Amb. 252. *Walker v. Birch*, 6 T. R. 262. 6 East, 25. *Hollingworth v. Took*, 2 H. B. 501. *Drinkwater v. Goodwin*, Cowp. 251. *Hammonds v. Barclay*, 2 East, 227. *Man v. Shiffner*, 2 East, 523. *Copland v. Stein*, 8 T. R. 199. *Houghton v. Matthews*, 3 B. & P. 485. Farriers, 7 East,

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IV.

* LIMITATIONS.

1. *Proof of a Right of Entry within twenty years.*
2. *Proof on plea of actio non accrevit, &c.*
3. *A subsequent acknowledgment, mutual account, &c.*
4. *Proof of disability.*

Since by the st. 21 Jac. I. c. 16, s. 1. (n), no person

229. 1 Salk. 18. Bac. Ab. *trover*, E. 4. *Brenan v. Currint*, Say.
 224. Selw. 1289. Of an innkeeper, *Thompson v. Lacy*, 3 B. & A.
 283. *Jones v. Thurloe*, 8 Mod. 172. *Jones v. Pearle*, 1 Str. 557. 6
 East, 23. Bac. Ab. tit. *Inns*. Burns, J. tit. *Alchouses*. 1 Salk. 388.
 2 Ld. Raym. 867. Insurance brokers, for a general balance, *White-
 head v. Vaughan*, Co. B. L. 566. *Parker v. Carter*. Co. B. L. 567.
Maans v. Henderson, 1 East, 335. *Man v. Shiffner*, 2 East, 523.
Snook v. Davidson, 2 Camp. 218. *George v. Claggett*, 7 T. R. 359.
Rabone v. Williams, 7 T. R. 360. n. *Lanyon v. Blanchard*, 2 Camp.
 597. *Richardson v. Goss*, 3 B. & P. 119. *Pulteney v. Keymer*, 3
 Esp. C. 182. Packers, for a general balance, *Savill v. Barchard*, 4
 Esp. C. 53. *Green v. Farmer*, 1 B. L. R. 651. 4 Burr. 2222. Paw-
 nees, *Hoare v. Hartopp*, 3 Atk. 44. Bro. Pledges, 28. Vin. Ab. tit.
Pawn. E. *McCombie v. Davies*, 6 East, 538. *Paterson v. Tush*, 2
 Str. 1178. *Newson v. Thornton*, 6 East, 17. *Fitzroy v. Geyllin*,
 1 T. R. 153. *Astley v. Reynolds*, 2 Str. 915. *Parker v. Patrick*, 5
 T. R. 175. Tailor, *Hussey v. Christie*, 9 East, 433. 6 Bac. Ab. 694.
 Yelv. 67. Of a shipwright, for the repairs of a ship, *Franklin v.
 Hosier*, 4 B. & A. 341. [4 Wheat. 438.] Of a ship owner, *Horn-
 castle v. Farran*, 3 B. & A. 497. A master of a ship has no lien on
 the receipt for wages, &c. 1 B. & A. 575. [Sed vide 2 Caines' Rep.
 81. 4 Mass. Rep. 91.] A vendee has by the common law a lien
 upon the property so long as it remains in his possession unpaid
 for. Hob. 41. *Mason v. Lickbarrow*, 1 H. Bl. 363. 2 Bl. Comm.
 448. *Hodgson v. Loy*, 7 T. R. 440. *Feize v. Wray*, 3 East, 93.
 Noy's Maxims, 88. 7 East, 571. *Dunmore v. Taylor*, Peake's C.
 41. *Slubey v. Heyward*, 2 H. B. 504. *Hammonds v. Anderson*, 1 N.
 R. 69. Of a wharfinger, *Crawshay v. Homfray*, 4 B. & A. 50. Qu.
 whether a lien is barred by the statute of Limitations. *Spears v.
 Hartly*, 3 Esp. C. 81.

A workman who bestows labour on a chattel for a stipulated sum may detain the chattel till the price be paid, although it be delivered at different times, if the work to be done under the agreement be entire. *Chase v. Westmore*, 5 M. & S. 180. Secus, as it seems, where the parties contract for a mode or time of payment inconsistent with the workman's claim to the possession. *Ibid.* [Yelv. 67, note.]

As to a ship-owner's lien, see *Christie v. Lewis*, 2 B. & B. 410; *Hutton v. Bragg*, 7 Taunt. 14; *Faith v. East India Co.* 4 B. & A. 630. [Gracie & al. v. Palmer & al. 8 Wheat. 605.]

Where by the usage of trade, a specific time is given to the importer for the payment of wharfage, the bankruptcy of the importer subsequent to that time does not give a right to detain as against a purchaser, previous to that time. *Crawshay v. Homfray*, 4 B. & A. 50.

(n) By the same stat. writs of formedon in descender, remain-

shall make any entry into any lands, tenements or * hereditaments, but within 20 years next after his right or title shall first descend or accrue (1); it is frequently a question, arising upon evidence, whether the entry of a party has been barred by an adverse possession by another for the space of 20 years, or whether on the contrary, such possession by the latter was by the assent and permission of the former; this subject has been already adverted to (o). Right of entry.

Where there is a doubt, whether possession by a party was adverse, or was merely permitted by the legal owner, it is a question of fact for the consideration of the jury (2).

Where the owners of an estate had let it for a term to the rectors of Beddington, the latter covenanting to pay

der, and reverter, are also limited to 20 years next after the accruing of the title. See *Cotterell v. Dutton*, 4 Taunt. 826. Twenty years adverse possession of a waste, inclosed, is a bar to the entry of a commoner. *Hawke v. Bacon*, 2 Taunt. 156.

(o) *Supra*, 506, 7.

(1) [A remainderman or reversioner cannot enter so as to avoid the statute, during the continuance of the particular estate; and consequently as to them, the statute does not commence running, until after the determination of the particular estate. *Jackson v. Schoonmaker*, 4 Johns. 390. *S. P. Wallingford v. Hearl*, 15 Mass. Rep. 471. *Wells v. Prince*, 9 Mass. Rep. 508. See also *Jackson v. Sellick*, 8 Johns. 262.

If a right of entry for a forfeiture of a life estate be barred by the statute, the right of entry arising afterwards on the death of tenant for life is not thereby affected: One of two rights of entry may be lost without impairing the other. *Stevens & ux. v. Winship & ux.* 1 Pick. 327.

In case of an entry by a grantor, from whom a deed has been extorted by duress, or by his heirs, for the purpose of avoiding the deed, the period prescribed by the statute is to commence from the delivery of the deed—as the deed conveys a seizin to the grantee. *Inhabitants of Worcester v. Eaton*, 13 Mass. Rep. 375.]

(2) [See *Bryan v. Atwater*, 5 Day, 181. *Jackson v. Ellis*, 13 Johns. 118. *Jackson v. Smith*, *ibid.* 406. *Jackson v. Moore*, *ibid.* 513. *Doe v. Campbell*, 10 Johns. 475. *Jackson v. Sears*, *ibid.* 435. *Jackson v. Thomas*, 16 Johns. 293. *Denn v. White*, 1 Cox's Rep. 94. *Den v. Morris*, 2 Halsted's Rep. 6. *Lux v. Pellet*, 1 Har. & J. 83. *n. Ridgeley v. Ogle*, 4 Har. & M'Hen. 123. *Stanley v. Turner*, Cam. & Nor. 533. 2 Hayw. 336. 1 Murphey, 14. *Borrets v. Turner*, 1 Taylor, 112. *Clinton v. Herring*, 1 Murphey, 414. *Bayley v. Isby*, 2 Nott & M'Cord, 343. *White v. Reid*, *ibid.* 534. *Williams v. M'Gee*, 1 Rep. Con. Ct. 97. *Bodley v. Coghill*, 3 Marsh. 615. *Dale v. Good*, 2 Overton's Rep. 394. *King v. Travis*, 2 Hayw. (Tenn.) Rep. 284. *Patton v. Hynes*, Cooke's Rep. 356. *Pederick v. Searle*, 5 Serg. & Rawle, 240. *Mace & al. v. Duffield*, 2 *ib.* 527. *M'Coy v. Dickinson College*, 5 *ib.* 254. *Lessee of Potts v. Gilbert*, Circuit Court, 1 Journal of Jurisprudence, 256. *Harrington v. Wilkins*, 2 M'Cord, 289.]

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rent, and also during the term to permit the lessors to take certain tithes, and after the expiration of the lease, the rector continued in possession of the land for more than 20 years without paying any rent, but the owners continued to take the tithes; upon ejectment brought by the owner against the rector, it was held to be a proper question for the jury, whether the possession was adverse or not, and they having found for the plaintiff, the court refused to set aside the verdict (*p*).

Proof on issue
of action non
accruevit.

* 888

Commence-
ment of the
action.

2. On issue taken on the plea of the statute of limitations (*q*), that the cause of action accrued within six * years, the burthen of proof lies on the plaintiff, and he must prove a cause of action within the limit (*r*). After proof of the cause of action itself, he must show the commencement of the action according to the issue taken. If the issue be on the question whether the cause accrued within six years of the *exhibiting of the bill*, the memorandum on the record will be evidence to show the day when the bill was exhibited (*s*).

Where the bill is intituled generally of the term, it has relation to the first day of the term (*t*).

Where the declaration has been filed in the vacation, and is intituled of the preceding term, it is competent to the defendant to prove that the action was in fact commenced after the expiration of the six years (*u*).

If the plaintiff to a plea of the statute, reply a writ sued

(*p*) *Roe d. Pellatt v. Ferrars*, 2 B. & P. 542. See the observations of Ld. Alvanley, C. J. and of Chambre, J. *Ibid*.

(*q*) The statute must be pleaded by the defendant (as to a set-off, see tit. *Set-off*.) But although the statute be not pleaded, yet if more than six years have elapsed, it may still be left to the jury to presume, from lapse of time, under the special circumstances, that the debt has been satisfied. See 2 Starkie's C. 407, and tit. *Payment*. A limitation of action for any thing *done, &c.* does not, it seems, apply to an action for money had and received. *Umphelby v. Maclean*, 1 B. & A. 42.

A debt is barred by the statute, although a warrant of attorney be given as a collateral security. *Clarke v. Figes*, 2 Starkie's C. 234.

(*r*) *Hurst v. Parker*, 1 B. & A. 92.

(*s*) See *Hundred.—Goods sold, &c.—Time*. Formerly the plea stated the day when the bill was exhibited, but this is not necessary, nor usual. 2 Will. Saund. 123, n. 5. A special *testatum copias*, though irregular, is a sufficient commencement to save the statute. *Beardmore v. Rattenbury*, 5 B. & A. 452. *Darwin v. Lincoln*, 5 B. & A. 444.

(*t*) 1 T. R. 116. [See Yelv. 71. note (2).]

(*u*) *Snell v. Phillips*, Peake's C. 209, and *supra*, 557.

out within the time, and the defendant by his rejoinder of *nul tiel* record, deny the existence of such a writ, the trial is by the court on inspection of the record (x) (1).

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If the plaintiff reply the writ *generally*, the defendant may in his rejoinder show the time when it really issued, and plead that the cause of action did not accrue within six years from that date. In this case (y), if the plaintiff in his sur-rejoinder allege a cause of action within the six years, and take issue on the fact, the day in the rejoinder will be taken to be the commencement of the action.

Commence-
ment of the
action.

* If the cause has been removed by *habeas corpus* from an inferior court, and after a declaration *de novo* in the superior court, the defendant plead that the cause of action did not accrue within the six years next before the *teste* of the *habeas corpus*; the plaintiff may reply the suit below, and show it to have been commenced within time to save the statute (z). So if the plaintiff having commenced a

* 889

(x) *Smith v. Bower*, 3 T. R. 662. And regular continuances must be shown on the record. [It is only when the writ and declaration disagree, that it is necessary to enter the continuances, in order to prevent the statute bar. *Schlosser v. Leshner*, 1 Dallas, 412.] An attachment of privilege is not a continuance of a bill of Middlesex, to save the statute. *Ibid*; and *vide supra*, 796, 7.

(y) *Vide supra*, 557.

(z) *Matthews v. Phillips*, 2 Salk. 424; for although this suit above

(1) [Where a plaintiff, by issuing a writ, has saved the statute bar, and the writ has not actually abated, it is not necessary, in Pennsylvania, that the action should be prosecuted within a year after the limited time has elapsed. *Schlosser v. Leshner*, 1 Dallas, 411. See *Brown's Ex'rs. v. Putney*, 1 Wash. 302. It is not a sufficient replication to a plea of the statute, that the plaintiff commenced a previous action within the period allowed by the statute, and, after the expiration of the period, was nonsuited by order of the court. *Harris v. Dennis*, 1 Serg. & Rawle, 236. *S. P. Montgomery v. Caldwell*, 4 Bibb, 305. *Peyton v. Carr*, 1 Randolph, 436. *Contra, Skillington v. Allison*, 2 Hawks, 347. *Lynch v. Withers*, 2 Bay, 118. The statute is a bar to an action brought within a year after a former action had been struck off. *Cawood v. Whetcroft*, 1 Har. & J. 103. *Callis v. Waddy*, 2 Munf. 511. S. P.]

Unless a second writ appears from the record to be an *alias*, it cannot, in Kentucky, be connected with a former writ, so as to avoid the statute. *Hume v. Dickinson*, 4 Bibb, 276. See *Jackson v. Horton*, 3 Caines' Rep. 127. Where an action is brought in due time after the reversal of a judgment for the same cause of action, it is saved out of the statute 21 Jac. 1. c. 16. *Drane v. Hedges*, 1 Har. & M'Hen. 518. So where judgment is arrested. *Schnertzell v. Chapline*, 3 ib. 439. The time, within which the new action must be commenced, is to be computed from the day on which judgment was reversed, and not from the end of the term of the court. *Edwards v. Davis*, 4 Bibb, 211.]

PART
IV.Commence-
ment of action.

suit within due time die (a), or being a feme sole at the commencement of the action, marry; the representative in the one case, or husband and wife in the other, if they commence a new action within a reasonable time afterwards (and this is usually understood to be a year), may reply the fact to a plea of the statute (1). The proof will be either by inspection of the record by the court, or by evidence of the cause of action within the time limited according to the nature of the rejoinder, which may either deny the existence of such a record, or deny that the cause of action arose within the time.

Proof of the
cause of action
within, &c.

In the case of trespass *quare clausum fregit*, and, as it seems, in other actions of *tort*, it is not sufficient to prove an acknowledgment of the trespass or *tort*, and a promise to make compensation within the limit (b). It has even been held, where there was no distinct evidence as to the time of committing the trespass, and it was doubtful whether it had been committed within six years, that such an acknowledgment by the defendant, and a promise to make compensation, was not evidence to go to a jury of a trespass within the six years (c). Although * fraud will take a case out of the statute, yet the statute will be a bar, if six years elapse after the discovery of the fraud (d) (11).

be no continuance of the suit below, yet the plaintiff has legally pursued his right.

(a) *Forbes v. Ld. Middleton*, Willes, 259, note E. 2 Salk. 424.

(b) Ibid. *Hurst v. Parker*, 1 B. & A. 92. [*Oothout v. Thompson*, 20 Johns. 277.]

(c) Ibid. Note there was no acknowledgment of a trespass committed within six years of the commencement of the suit, for even although the acknowledgment might prove a cause of action then existing, it does not follow that it existed at a subsequent time.

(d) Per King, Ld. C. in *The South Sea Company v. Wymondsell*, 3 P. Wms. 143. *Bree v. Holbeck*, Doug. 654.

(1) [In Maryland, the statute is no bar where a suit is brought in time, which abated by the defendant's death, there being no letters testamentary taken out—nor is it barred until the expiration of three years, if a suit is brought without delay against the executor. *Parker v. Fassit*, 1 Har. & J. 339. See also *M'Lellan v. Hill*, Cam. & Nor. 479. *Jones v. Brodie*, 2 Murphey, 594.

A replication to a plea of the statute, that the suit was instituted within one year after the death of the intestate, and that five years after the action accrued had not expired at the time of the intestate's death, is not, in Kentucky, a sufficient answer to the plea. *Langford v. Gentry*, 4 Bibb 468. A writ, taken out against one of several administrators, will not prevent the statute from running against the debt. *Hopkins v. M'Pherson's Admr.* 2 Bay, 194.]

(11) [A plea of the statute may be avoided by replying that the

If a bill, payable to one who dies intestate, is accepted after his death, the statute runs from the date of the letters of administration ; for till then there is no cause of action in any one (o). And a special replication is unnecessary (p).

Proof of a
cause of ac-
tion, within,
&c.

In an action against an attorney for negligence, it seems that the statute runs from the time when the plaintiff was damnified, and not from the time of the negligence (e) (2).

In an action for words actionable in themselves, the statute runs from the time of the speaking, although they have occasioned special damage (f), and the action must be brought within two years. Where special damage is the gist of the action, the statute runs from the time of the special damage only ; and the limitation is six years (g).

(o) *Murray v. East India Company*, 5 B. & A. 204. See *Stamford's case*, Cro. Jac. 81. *Cary v. Stephenson*, 1 Salk. 42.

(p) 5 B. & A. 204.

(e) *Compton v. Chandless, one, &c.* 4 Esp. C. 18. See *Hickman v. Walker*, Willes, 27. *Littleboy v. Wright*, 1 Lev. 69. *Peake v. Ambler*, W. Jones, 329. 15 Vin. Ab. tit. *Limitation*. A law agent was held to be responsible for negligence after a lapse of 25 years, and acquiescence in the loss and settlement of account and discharge by the client's representative ; it appearing that the defendant had concealed the real state of the transaction, and had not communicated the insolvent state of the parties with whom he dealt. *Macdonald v. Macdonald*, 1 Bligh, 315.

(f) According to the stat. 21 Jac. I, c. 16, s. 3. 6 Bac. Ab. 241. Cro. Car. 193. 1 Salk. 206. 1 Sid. 95.

(g) *Ibid.* An action for *scan. mag.* may be brought within six

cause of action had been fraudulently concealed by the defendant, until within the time limited by the statute before action brought. *First Massachusetts Turnpike Co. v. Field & al.* 3 Mass. Rep. 201. So in an action for fraud, by replying ignorance of the fraud until within the same time. *Homer v. Fish & al.* 1 Pick. 435. *S. P. Jones v. Conoway & al.* 4 Yeates, 109. See also *Croft v. Arthur*, 3 De-sauss. 223. *Harrell v. Kelly*, 2 M'Cord, 426.

This doctrine is denied in New York, North Carolina, and Virginia, where the remedy in cases of fraud, &c. is confined to the court of chancery. *Troup v. Ex'rs. of Smith*, 20 Johns. 33. *Oothout v. Thompson*, *ibid.* 278.—*Hamilton v. Sheppard*, 2 Murphey, 115. *Thompson v. Blair*, *ibid.* 583.—*Callis v. Waddy*, 2 Munf. 511.

See on this subject, Sel. Cas. in Chan. 34. 3 Atk. 538. 1 Bro. P. C. 455. 2 Scho. & Lef. 634.]

(2) [In an action against an officer for an insufficient return upon an original writ, by reason of which the judgment rendered in the suit is reversed, the statute begins to run from the time of such return, and not from the time of the reversal of the judgment. *Miller v. Adams*, 16 Mass. Rep. 456. But in an action for taking insufficient bail, the statute begins to run from the return of *non est inventus* upon the execution against the principal. *Mather v. Green*, 17 Mass. Rep. 60.]

PART
IV.Non assump-
sit, &c.

Where the cause of action and promise are contemporaneous, as in cases of *indebitatus assumpsit*, the plea of *non assumpsit infra sex annos* is proper; but where the cause of action arises subsequently to the promise, as in cases of executory contract, the plea of *non accrevit infra sex annos* is the proper plea; for although the promise was not made within the limit, the cause of action accrued within the time, which is sufficient to save the statute (*h*).

- * 891 * Where money lent is the consideration for a bill of exchange, payable on a future day, or for a promise of repayment at a future day, the latter is the day from which the limitation is to be reckoned (*i*). And where a note is payable at a specified time after sight, the statute does not begin to operate till that time has expired after presentment of the note (*k*).

Where a note is payable on demand, the statute runs from the demand, and not from the date (*l*).

A factor impliedly contracts to account for such goods consigned to him for sale, as he has sold, to pay over the proceeds, and to deliver the residue unsold on demand. An action for not accounting does not lie until a demand be made, and from that time the statute runs (*m*). But in such cases, after a reasonable time has elapsed, the Jury may presume that the consignor has made a demand, and that the factor has accounted (*n*).

Where special damage has resulted from a breach of

years. Cro. Car. 535. Where the limitation is as to any thing done under the Act, if the action be *trespass*, it must be brought within the limit from the act of trespass, but if the action be case for consequential damage, the time runs from the time of the damage. *Roberts v. Read*, 16 East, 215; and see *Sutton v. Clarke*, 6 Taunt. 29. *Vide post*, 1399.

(*h*) See 1 Saund. 33, n. 2. 283, n. (2). 2 Saund. 63, c. n. (6). *Gould v. Johnson*, 2 Ld. Raym. 838. 2 Salk. 422. *Buckler v. Moor*, 1 Vent. 191. [*Banks v. Coyle*, 2 Marsh. (Ken.) Rep. 562.]

(*i*) *Whittershiem v. Countess of Carlisle*, 1 H. B. 631; which was an action by the payee against the drawer of a bill of exchange, to secure a sum lent by the payee to the drawer, and it was held that the statute began to operate, not from the loan, but from the time when the bill became due. And see Ld. Holt's *dictum*. 3 Bac. Ab. 602.

(*k*) *Holmes v. Kerrison*, 2 Taunt. 323.

(*l*) Per Ld. Hardw. 1 Ves. 344. *Christie v. Fonsick*, Sel. N. P. 131. 339; but see *Harris v. Ferrand*, Hardr. 36. *Buckler v. Moor*, 1 Mod. 89. 15 Vin. Ab. tit. *Limitations*, pl. 14.

(*m*) *Topham v. Braddick*, 1 Taunt. 572.

(*n*) *Ibid*; and 14 years was held to be a reasonable time.

contract, the limitation is to be computed from the time (o) of the breach of contract, and not of the special damage.

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* Where six years had elapsed since the committing of a trespass, by cutting down trees, it was held that an action could not be maintained for the produce of the sale of the trees within the six years (p).

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Non assump-
sit, &c.

Where the defendant had once been tenant to the plaintiff, and no notice to quit had been given, but the defendant had not occupied, paid rent, or done any act within the last six years from which a tenancy could be inferred, it was held, that the statute of limitation was a good defence (q).

Upon issue taken upon the replication of a promise within six years, the plaintiff may give in evidence, not only an express promise within six years to pay the debt, but even an acknowledgment that the debt still subsists, for the admission is evidence of a *new promise* to pay the debt (r); or the law implies an *assumpsit*, or creates a new debt (s). Perhaps it would be more proper to say, that the subsequent

Replication
of a promise
within six
years.

(o) *Battley v. Faulkner*, 3 B. & A. 290, where the damage was the being obliged by a suit in Scotland to pay damages to a vendee on the re-sale to him of goods originally sold by the defendant to the plaintiff. So in *Short v. McCarthy*, 3 B. & A. 626. A plea to an action for deceitfully delivering goods to the plaintiff, as the proper goods of the defendants, by means of which they were subsequently damaged, that the defendants were not guilty within six years, was held to be bad on special demurrer. *Dyster v. Battye*, 3 B. & A. 448. And see *Ld. Ellenborough's* observations in *McFadden v. Olivant*, 6 East, 387.

(p) *Hughes v. Thomas*, 13 East, 474. The case was decided on the ground, that if a tenant for life levy a fine, and thus acquire a base fee, and cut down timber before the entry of the reversioner and owner of the inheritance, to avoid the fine and base fee, the reversioner cannot recover the value, the entry having no relation during the continuance of the base fee. And see *Berrington v. Parkhurst*, 13 East, 489; and *Doe d. Compere v. Hicks*, 7 T. R. 433.

(q) *Leigh & Wife v. Thornton*, 1 B. & A. 625.

(r) So considered in *Hyeling v. Hastings*, 1 Ld. Raym. 421. A promise made after the action is, it seems, sufficient. *Yea v. Fouraker*; 2 Burr. 1099; [*Danforth v. Culver*, 11 Johns. 146.] *Secus*, in the case of an infant, *Thornton v. Illingworth*, K. B. sitt. in Bank, after Easter, T. 1824. [See this case cited *Ante*, 725; and *note*.] Or in any case where the promise creates an entirely new debt. Per Bayley, J. *Holt v. Brien*, 4 B. & A. 252.

(s) See the observations of *Ld. Ellenborough* in *Bryan v. Horseman*, 4 East, 599; and therefore it is sufficient, if the Jury find the fact of acknowledgment, without specially finding a promise; and it is not necessary that the acknowledgment should be made to the plaintiff. *Halliday v. Ward*, 3 Camp. 32. *Mounstephen v. Brooke*, 3 B. & A. 141.

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Promise within
six years.

acknowledgment * rebuts the presumption raised by the statute, that the debt has been paid (*t*). And the plaintiff may declare on the original promise, and rely on the subsequent acknowledgment, to take the case out of the statute (*u*). Any words or expressions from which the Jury can safely infer a *subsisting debt* seem to be sufficient for this purpose (*x*).

(*t*) It is impossible to read the conflicting cases upon this subject without regretting that the Courts have ever departed from the plain letter of this wholesome statute.

(*u*) [*Lord v. Shaler*, 3 Conn. Rep. 131.] *Leaper v. Tutton*, 16 East, 420, where the plaintiff declared against the defendant as the acceptor of a bill of exchange ; but note, there the acknowledgment was evidence on the account stated. See *Bicknell v. Keppel*, 1 N. R. 21, and see the next note.

(*x*) The following acknowledgments have been held to be sufficient: "I do not consider myself as owing Mr. B. a farthing, it being more than six years since I contracted ; I have had the wheat, I acknowledge, and I have paid some part of it, and 26l. still remains due." There the Court thought themselves bound by the long train of previous decisions: *Bryan v. Horseman*, 4 East, 599, but see *Bicknell v. Keppel*, 1 N. R. 20, *infra*, 896 ; so where the defendant has said, "Prove your debt, and I will pay you ;" [*Seaward v. Lord*, 1 Greenleaf, 163.] or, "I am ready to account ; but nothing is due ;" and even slighter acknowledgments than these have been held to be sufficient to take the case out of the statute. Per Ld. Mansfield, C. J. in *Trueman v. Fenton*, Cowp. 548.

So where the defendant meeting the plaintiff, said, "what an extravagant bill you have sent me," per Ld. Kenyon, *Lawrence v. Worrall*, Peake's C. 93, it was held to be an acknowledgment that some money was due. So where the debtor referred his creditor to his trustee, (*Baillie v. Lord Inchiquin*, 1 Esp. C. 435). So where a surety on a promissory note on a demand within six years, said, you know I had not any of the money myself, but I am willing to pay half of it (B. N. P. 149 ; 2 Burr. 1099), there the acknowledgment was made after the commencement of the action. So although in making the admission, the defendant deny his liability in point of law. As where being sued as acceptor of a bill of exchange he acknowledged his acceptance, and that he had been liable, but denied his liability then, because it was out of date, it was held to be sufficient to take the case out of the stat. (*Leaper v. Tutton*, 16 East, 420). So where the defendant said that the plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, and been discharged, as well by law as from the length of time since the debt accrued, Ld. Kenyon is said to have held, that it was sufficient to take the case out of the statute, *Clarke v. Bradshaw*, 3 Esp. C. 155 ; *qu. tam. & vid. Owen v. Woolley*, B. N. P. 148 ; & *infra*.

So where the defendant said, "if others pay I will pay, (*Loweth v. Fothergill*, 4 Camp. 185). So where the defendant, on a demand being made for seamen's wages, for services which took place during a Russian embargo, said "I will not pay ; there are none paid ; and I do not mean to pay unless obliged ; you may go and try ;" for there was proof of the service, and an acknowledgment by the defendant

* The statute of limitations proceeds on a presumption, that when a debt is really due, a party is not likely to

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that it had not been paid for (*Douthwaite v. Tibbut*, 5 M. & S. 75.) So where the defendant said, "if you had presented the protest, it would have been paid," no protest being necessary. *De la Torre v. Barclay*, 1 Starkie's C. 7.

An acknowledgment by a wife will be sufficient, (1) if she has been intrusted with the management of the business out of which the debt arises. (*Palethorpe v. Furnish*, 2 Esp. C. 511, n. Cor. Lord Mansfield, 2 Freem. 178; *Anderson v. Sanderson*, 2 Starkie's C. 204. Cor. Richards, C. B. York, 1817. *Supra*, tit. *Admissions*, p. 46. 57). So in general as to an acknowledgment by an agent (*Burt v. Palmer*, 5 Esp. C. 145. *Supra*, tit. *Agent*, p. 57). A conditional promise to pay by instalments, if time should be given, has been held to take the case out of the statute (*Thomson v. Osborne*, 2 Starkie's C. 98); but in the previous case of *Davies v. Smith*, 4 Esp. C. 36, it was held by Ld. Kenyon, that it was not enough to prove a promise to pay when the party should be able, without proving that he was able at the time of the action. [*S. P. Robbins v. Otis*, 1 Pick. 368. *Read v. Wilkinson*, Circuit Court, 2 Browne's Rep. Appx. 16.]

It is otherwise where the defendant, admitting the receipt of the money, denies his debt in fact as where the defendant, acknowledging the receipt of money, claims it as a gift (*Owen v. Woolley*, B. N. P. 148). So if the defendant insisting on the statute, deny the debt, as where he said, "I owe you not a farthing, it is six years since," this is not evidence to be left to a Jury (*Coltman v. Marsh*, 3 Taunt. 380). See also *Hellings v. Shaw*, 1 Moore, 240. Where the plaintiff, in an action on a promissory note, proved that within the six years he showed the note to the defendant, who said, "you owe me more money; I have a set-off against it," no set-off having been pleaded, it was held by Bayley and Holroyd, Justices, Best, J. *dissentiente*, that this was not a sufficient acknowledgment to take the case out of the statute. *Swan v. Sowell*, 2 B. & A. 759. [See *White v. Potter*, 1 Coxe's Rep. 159.] Where the defendant says, "I have paid the debt, and will send a copy of the receipt," his omission to do so has been held to be sufficient to go to a Jury, Holt's C. 381. per Gibbs, C. J. But see *Birk v. Guy*, 4 Esp. C. 184, where the defendant said, "I have paid the debt, and will send a copy of the receipt;" and Ld. Ellenborough held that it was not sufficient. [See *Mosher v. Hubbard*, 13 Johns. 510.] So where the defendant said, "I shall be able to satisfy him respecting the misunderstanding which has occurred between us" (*Craig v. Cox*, Holt's C. 380. See also *Ward v. Hunter*, 6 Taunt. 210). Where the defendant at the time when he admits the debt, insists that it has been discharged by a written instrument, the whole declaration must be taken together (*Partington v. Butcher*, 6 Esp. C. 66. Mansfield, C. J. 1806); and *vid. sup.* Vol. I. p. 292, 3. *Earl of Montague v. Lord Preston*, 2 Vent. 170; and *Bermon v. Woodbridge*, Doug. 781. But if it appear that the instrument referred to does not amount to a discharge, it is a sufficient acknowledgment. (Ib.) Where an accountable receipt for the payment of money was shown to the

(1) [A promise by a wife, made after marriage, to pay a debt, contracted before marriage, will not take the case out of the statute. *Arson v. Blakely*, 2 M'Cord, 5.]

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Evidence of an
acknowledg-
ment.

evidence be given *aliunde* to prove the existence of the debt, then it seems that any expressions of the defendants, which tend to show * that it has not been satisfied, are evidence for the consideration of the Jury (b); but if such evidence be not given, a mere admission that a sum claimed has not been satisfied, will not be sufficient without some further admission that the debt once existed (c). If, however, the defendant acknowledge the existence of the debt, and that it remained unsatisfied within the six years, it will be sufficient, although he stand upon the statute (d). So if he allege a discharge on specific grounds, which are proved to be false (e). But it seems that evidence is not admissible in order to falsify the mode of discharge, unless it be precisely ascertained by the defendant's statement (f). If the acknowledgment be general, and a pre-

(b) See 4 M. & S. 461.

(c) *Rowcroft v. Lomas*, 4 M. & S. 457; and *supra*, 895, note (y).

(d) 4 M. & S. 459, per Ld. Ellenborough. *Bryan v. Horseman*, 4 East, 599.

(e) See the observations of Gibbs, J. in *Craig v. Cox*, Holt's C. 380; and *Beale v. Nind*, 4 B. & A. 568.

(f) *Beale v. Nind*, 4 B. & A. 568. In this case, the defendant alleged that the plaintiff's bill had been paid to Long, a deceased partner of the plaintiff, by the latter retaining the amount out of a floating balance which had been in his hands; and evidence was adduced by the plaintiff to falsify this, by showing the state of the accounts between the defendant and Long. After a verdict for the defendant, the court held, that even admitting that as laid down by Gibbs, C. J. in *Hellings v. Shaw*, 7 Taunt. 612, that where a defendant, alleging payment, designates the time and mode so strictly, that the Court can say it is impossible that it should have been discharged in any other mode, then the plaintiff is at liberty to disprove that mode, yet, that the principal case did not fall within the rule, as the time and mode were not designated strictly, and the evidence was not sufficient to negative that time and mode.

In the case of *Hellings v. Shaw*, 7 Taunt. 608, [S. C. 1 Moore, 344,] the defendant, to a demand made for the charges of executing an annuity-deed, answered, "I thought I had paid it at the time, but I have been in so much trouble since that I really don't recollect it," evidence was adduced to show that the debt had not been paid at the time; but the Court held that the acknowledgment was insufficient, as it did not sufficiently put in issue whether the debt had been paid at the particular time. Gibbs, C. J. in that case, in addition to the case already cited, mentioned others, in which the courts have held a defendant liable who was discharged by the words of the statute, viz. where he has admitted that the debt is unpaid, but alleges that it has been discharged by lapse of time; a third, where the defendant challenges the plaintiff to produce a particular proof of his liability, which the plaintiff does. [See note to this case, in American edition of 7 Taunt.]

A. having

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ceding debt be proved, it seems that it will lie on the defendant to show that the acknowledgment applied * to a different demand (e). But if the defendant wholly deny the debt, although he admit the receipt of the money (f), or deny the debt, insisting that it has been barred by the statute (g), there is no evidence of an acknowledgment to go to a jury. It is not necessary that the new promise or acknowledgment should be in writing, although the original promise, as to guarantee the debt of another, was required to be in writing (h).

* 897

Evidence of an acknowledgment.

Evidence of an acknowledgment by one of several joint contractors is sufficient to bind the rest (1), even in separate actions against them; and although the acknowledgment be made not to the plaintiff, but by one of two co-contractors to the other (i), or to a third person (k); and al-

A. having by means of misrepresentation obtained money from B. and others, to which he was not entitled, on application by B. to have the money returned, saying that he and the other tenants had been induced to pay more than was due, replies, if there be any mistake it shall be rectified, this takes the case out of the statute as to all. *Clarke v. Hougham*, 2 B. & C. 149. On a replication of a promise within six years to a plea of the statute, fraud is no answer to the plea. *Ibid.*

As to the effect of an acknowledgment by a wife during coverture, vide *Pillam v. Foster*, 1 B. & C. 248, *supra*, 713.

The principle does not apply to an acknowledgment made by one acting *alieno jure*. A. and B. made a joint and several promissory note, and ten years after the death of A.—B. (who was one of A.'s executors,) made a payment on the note on his own account, and it was held that this was no evidence of a promise by the executors. *Atkins v. Tredgold*, 2 B. & C. 23.

(e) *Baillie v. Lord Inchiquin*, 1 Esp. C. 435.

(f) *Owen v. Woolley*, B. N. P. 148.

(g) *Coltman v. Marsh*, 3 Taunt. 380.

(h) *Gibbons v. M'Casland*, 1 B. & A. 690.

(i) [*Beitz v. Fuller*, 1 M'Cord, 541.] In an action against A. on the joint and several promissory note of A. and B. it was held that a letter written by A. to B., desiring him to settle the money, took the case out of the statute; *Halliday v. Ward*, 3 Camp. 32. The same evidence seems also to be sufficient on issue taken on the plea, *actio non accrevit infra sex annos*.

(k) As in a deed between the defendants and a third person. *Mountstephen v. Brooke*, 3 B. & A. 141. See also *Clarke v. Hougham*, 2 B. & C. 149.

(1) [The acknowledgment of one heir or devisee is sufficient to take a case out of the statute, as respects all. *Johnson v. Beardsley*, 15 Johns. 3.]

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acknowledg-
ment.

though it has been made by one of two partners subsequent to the dissolution of partnership (*l*) (*2*).

Where one of two makers of a joint and several promissory note became bankrupt, the receiving a dividend under the commission within six years next before bringing the action, was held to be sufficient in an action against the other maker (*m*).

* 898 The principle upon which such evidence is admissible, is, as has been already observed (*n*), the community of *interest between the party making the admission, and the party to be affected by it, and the presumption that the former would not acknowledge that which was adverse to his own interest. And hence it may perhaps be doubted, whether such evidence be sufficient for such a purpose, where the party making it is no longer responsible (*o*).

Where one of two joint drawers of a bill of exchange became bankrupt, and the indorsees proved under the commission a debt exceeding the amount of the bill, and exhibited the bill as a security for the debt, and received a dividend within six years next before the action against the solvent partner, it was held that the action was barred by the statute (*p*). This case was distinguished by the court from that of *Jackson v. Fairbank*, for there the claim was made, and the dividend received upon the instrument itself (*q*); in the latter case the dividend was on a distinct debt, and the instrument was introduced but incidentally, and the introduction or omission of it neither increased nor

(*l*) *Wood v. Braddick*, 1 Taunt. 104. [*Smith v. Ludlow*, 6 Johns. 267. *M'Intire v. Oliver*, 2 Hawks, 209. See *Supra*, 45, note (1).]

(*m*) *Jackson v. Fairbank*, 2 H. Bl. 340. But see the observations on this case, in *Brandram v. Wharton*, 1 B. & A. 463. [*Roosevelt v. Marks*, 6 Johns. Ch. Rep. 292.]

(*n*) *Supra*, 44.

(*o*) 1 B. & A. 463. See the observations of Bayley and Abbott, justices.

(*p*) *Brandram v. Wharton*, 1 B. & A. 463. Lord Ellenborough, in giving judgment, founded himself on the distinction between express and implied acknowledgments; and see his Lordship's observations in *Holme v. Green*, 1 Starkie's C. 488.

(*q*) See the observations of Abbott and Holroyd, Js.

(2) [In Virginia, though the acknowledgment of a debt by one or more partners, after a dissolution of the partnership, will remove the bar of the statute, in an action against the firm—the existence of the debt being first proved by other testimony or admitted by the pleadings—yet it is not of itself proper evidence of the existence of the debt, so as to charge the other partners. *Shelton v. Cocke & al.* 3 Munf. 191.]

diminished the claim upon the dividends. And it seems that such evidence is not sufficient to bind a partner, unless it be clear and explicit (*r*).

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A subsequent promise to take the debt out of the statute of limitations must agree with the original promise stated in the declaration. A subsequent acknowledgment to an executor will not support a * declaration framed on * 899 promises to the testator (*s*); and an acknowledgment of negligence made within six years will not support a special action of *assumpsit*, founded on negligence, which took place more than six years ago (*t*), although in fact the negligence was first discovered within the six years.

Subsequent
promise.

So where the cause of action arises from the doing or not doing some act at a particular time in breach of a contract, an acknowledgment within six years of the previous breach of contract will not avoid the statute (*u*).

Where there is a mutual account between the parties, every new item and credit in the account given by the one party to the other is an admission of there being some unsettled account between them, the amount of which is to be afterwards ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute (*x*).

Mutual ac-
counts.

* Where the items of account are all on one side, as in * 900 an account between a tradesman and his customer, and

(*r*) Per Ld. Ellenborough, 1 B. & A. 468; and *Holme v. Green*, 1 Starkie's C. 488.

(*s*) *Sarell v. Wine*, 3 East, 409, and per Holroyd, J. in *Short v. M'Carthy*, 3 B. & A. 632. [See *Supra*, 553, note.]

(*t*) *Short v. M'Carthy*, 3 B. & A. 632. and *supra*, 889, 890.

(*u*) *Boydell v. Drummond*, 2 Camp. 157. [See *Supra*, 889, note (*b*).]

(*x*) Per Ld. Kenyon, C. J. in *Catling v. Skoulding*, 6 T. R. 189. In that case the defendants had hired certain premises of the plaintiff's testator for twenty-one years; ten years afterwards the testator died, and rent for nine years and a half was then due; and 20*l.* was also due for cash lent on account, seven or eight years before the death, and the testator was indebted to the defendant for various articles supplied by them in their trade. The last half year's arrear of rent, and one or two of the last articles of the defendants' bill, for goods supplied, were within six years before the suing out of the writ. The amount of the articles furnished by the defendants within the last six years, was more than sufficient to cover the last half-year's rent. There had never been any settlement of account between the defendants and the testator. The balance due to the testator at the time of his death, was 17*l.* Issues were joined on the pleas of *non assumpsit*, and set-off, and on the replication of a promise within six years, and the court, after a consideration of all the former cases, held that the executors were entitled to recover.

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counts.**

there be some items within the six years, but the rest are beyond it, the modern items will not entitle the plaintiff to give evidence of the former (y).

Where there is a mutual account, but no item has accrued within the six years, the plaintiff will be precluded from recovering under this issue (z), or indeed from recovering at all, unless he can bring his case within the exception of the statute concerning merchants' accounts, which must be done by means of a special replication (a) (1).

Where there are cross-demands arising out of the same transaction, and the plaintiff has kept alive his claim by continued process, he cannot avail himself of the statute to defeat the defendant's set-off (b).

Disability.

* 901

The disability (c) of a party must usually be pleaded in reply to a plea of the statute of limitations, but in some instances is matter of evidence, as upon trials of ejectments.

(y) Per Denison, J. in *Cotes v. Harris*, B. N. P. 149.

(z) Per Ld. Kenyon, 6 T. R. 192.

(a) Ibid. And the clause as to merchants' accounts extends to those cases only where there are mutual accounts and reciprocal demands between two persons. Per Denison, J. *Cotes v. Harris*, B. N. P. 149; and only to accounts current between merchants, and not to accounts stated between them. (*Webber v. Twill*, 2 Saund. 124, and see the cases cited, 2 Will. Saund. 127. (6.) The rule is, that if the account be once stated, the plaintiff must bring his action within six years, but if it be adjusted, and a following account be added, the plaintiff is not barred by the statute, for it is a running account. (Ibid. and *Farrington v. Lee*, 1 Mod. 270. 2 Mod. 311, 312. *Scudamore v. White*, 1 Vern. 456. *Welford v. Liddel*, 2 Ves. 400. *Cranch v. Kirkman*, Peake's C. 121.) The clause is not confined to merchants. Ibid. and 2 Will. Saund. 127, b. although that opinion seems once to have prevailed. Ibid.

(b) *Ord v. Ruspini*, 2 Esp. C. 569.

(c) The exception in the stat. 21 Jac. 1. c. 16, s. 7, was held to apply to the case of absent plaintiffs only. (*Hall v. Wybourn*, Carth. 136.) But the stat. 4 Ann. c. 16, s. 19, enacts, that if any person against whom there is any cause of action for seamen's wages, or of action on the case, the party may bring his action against such person after his return within the time limited by the former statute. See *Williams v. Jones*, 13 East, 439.

(1) [As to mutual accounts, &c. see *Franklin v. Camp*, 1 Coxe's Rep. 196. *Smith v. Ruecastle*, 2 Halsted's Rep. 357. *Murray v. Coster*, 5 Johns. Ch. Rep. 522. S. C. 20 Johns. 576. *Bennet v. Davis*, 1 N. Hamp. Rep. 19. *Stiles v. Donaldson*, 2 Yeates, 105. S. C. 2 Dallas, 264. *Coleman v. Hutchinson*, 3 Bibb, 209. *McNaughton v. Norris*, 1 Hayw. 216. *Cogswell v. Dolliver*, 2 Mass. Rep. 217. *Mandeville v. Wilson*, 5 Cranch, 15. *Bond v. Joy*, 7 Cranch, 350.]

Where it is incumbent on a plaintiff to prove that he laboured under any disability, which exempts him from the operation of the statute of limitations, he must show that it was a *continuing* disability from the first; for it seems to be a general rule, that where such a statute has once begun to operate, no subsequent disability will restrain its progress (c) (1). If therefore a plaintiff be in England when

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(c) See *Ld. Kenyon's* observations in *Doe d. Duroure v. Jones*, 4 T. R. 309. *Gray v. Mendez*, 1 Str. 556. Ireland is beyond seas, within the meaning of the stat. 21 Jac. 1. c. 16, per *Holt*, C. J. 1 Show. 91; but Scotland is not. *King v. Walker*, 1 Bl. R. 286 (2).

(1) [In South Carolina and Kentucky, if an ancestor dies, against whom the statute has begun to run, its practical operation is nullified, in favour of his minor heirs; and it begins to run against them in the same manner as if the cause of action had first accrued upon his death. *Rose v. Daniel*, 2 Const. Rep. 549. *Cook v. Wood*, 1 M'Cord, 139—*Mackir v. May*, 4 Bibb, 43. This is an exception to the rule which operates in other cases, in those States. *May v. Slaughter*, 3 Marsh. 511.

War between the countries of the creditor and debtor suspends the operation of the statute, during its continuance. *Wall v. Robson*, 2 Nott & M'Cord, 498. See *Post*, Vol. III. 1090.

The treaty of peace of 1783, between the U. States and G. Britain, which stipulates (art. 4) "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted"—prevented the operation of a statute of limitations upon British debts contracted before that treaty. *Hopkirk v. Bell*, 3 Cranch, 454. But in the case of *Beattie v. Tabb's Adm'r*. 2 Munf. 254, it was held that the circumstance that a plaintiff is a British subject, and was entitled to his claim before the year 1776, is not in itself sufficient to protect him against the operation of the Virginia statute of limitations.]

(2) [The terms "beyond seas," in the statute of Georgia, are equivalent to *without the limits of the State*. *Murray's Lessee v. Baker*, 3 Wheat. 541. So of the statute of any other State. Per *Marshall*, C. J. 3 Cranch, 177, *Faw v. Roberdeau's Ex'r*. The same construction prevails in Maryland, South Carolina and Massachusetts. *Brent v. Tasker*, 1 Har. & M'Hen. 89. *Pancoast v. Addison*, 1 Har. & J. 350.—*Forbes v. Foot*, 2 M'Cord, 331.—*White v. Bailey*, 3 Mass. Rep. 271. *Byrne v. Crowninshield*, 1 Pick. 263.

In Pennsylvania, the terms "beyond the sea," is construed to mean *without the United States*. *Thurston & al. v. Fisher*, 9 Serg. & Rawle, 288. *Ward v. Hallam*, 2 Dallas, 217. S. C. 1 Yeates, 329. And in Connecticut, "over the sea" was held, by the Superior Court, not to extend to Halifax (N. S.) *Gustin v. Brattle*, Kirby, 299. It is believed, however, that this decision was reversed by the Supreme Court of Errors in that State.

"Out of the country" in the statute of Kentucky, means out of the State. *Mansell v. Israel*, 3 Bibb, 510. But the statute runs against citizens of Virginia who visited Kentucky, after the cause of action accrued, while it composed a part of Virginia. *May v. Slaughter*, 3 Marsh. 507. But where there are several non-resi-

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his right of action or title accrues, and he then depart beyond seas, and the time limited elapses, he and his representatives will be barred (*d*).

So if one of several partners be in England when the cause of action accrues, although the rest be then beyond seas (*e*).

And if an estate descend to parceners, one of whom is under a disability, which continues for more than twenty years, and the other does not enter within the twenty years, the disability of the one does not preserve the title of the other (*f*) (2).

(*d*) *Smith v. Hill*, 1 Wils. 134. [S. P. *Halsey v. Beach*, 1 Penn. Rep. 122. *Peck v. Randall*, 1 Johns. 165. *Fitzhugh v. Anderson*, 2 Hen. & Mun. 289. *Dow v. Warren*, 6 Mass. Rep. 328. *Bunce v. Wolcott*, 2 Conn. Rep. 27. *Griswold v. Butler*, 3 ib. 227. *Gustin v. Brattle*, Kirby, 299. *Hudson v. Hudson*, 6 Munf. 352. *Anon.* 1 Hayw. 416. 459. *Den v. Mulford*, ibid. 311. *Pearce v. House*, 2 Taylor, 305. *Faysour v. Prather*, 1 Nott & M'Cord, 296. *Adameon v. Smith*, 2 Rep. Con. Ct. 269. *Hall v. Vandegrift*, 3 Binney, 374. *Wells v. Newbolt*, Cam. & Nor. 375. *Inman v. Barnes*, 2 Gallison, 315. *Kendal v. Slaughter*, 1 Marsh. (Ken.) Rep. 377. *Richardson v. Whitefield*, 2 M'Cord, 148. *Walden v. Heirs of Gratz*, 1 Wheat. 292.]

(*e*) *Perry v. Jackson*, 4 T. R. 516. *Hall v. Wybourn*, Carth. 136. and *Chevely v. Bend*, Carth. 126. [See *Pendleton & al. v. Phelps & al.* 4 Day, 476.]

(*f*) *Roe d. Langdon v. Rowston*, 2 Taunt. 441. [S. P. *Doolittle & ux. v. Blakesley*, 4 Day, 265. *Johnson v. Harria*, 3 Hayw. (Tenn.) Rep. 113. *Thomas v. Machir*, 4 Bibb, 412. *Riden v. Frien*, 2 Murphey, 577.]

dent plaintiffs, the coming of one of them into the State, will not take a case out of the statute as respects the others. *Jones v. Hersey*, 3 Littell's Rep. 48.

In *Sleght v. Kane*, 1 Johns. Cas. 76, a statute of New York which saved the rights of persons "out of the State," was held to mean *out of the jurisdiction of the State*—and that it applied to a person who was within the British lines within that State, during the war of the revolution—he having been "where the authority, which was exercised, was derived, not from the State, but from the king of Great Britain, by right of conquest."

Foreigners who have never been in the U. States or the States where they sue, are within the exception of the statutes of limitation,—the phrase "return" meaning *come into the State*. *Hall v. Little*, 14 Mass. Rep. 203. *Chomqua v. Mason & al.* 1 Gallison, 342. *Ruggles v. Keeler*, 3 Johns. 263. S. P. 3 Wils. 145. 2 Bl. Rep. 723. See also *Jones v. Hersey*, ubi sup. *Sed vide* 1 Har. & J. ubi sup. And this doctrine applies, although the foreign plaintiff had an agent residing in the State where he brings his suit. *Wilson v. Appleton*, 17 Mass. Rep. 180.]

(2) [Coparceners, whose right of entry is barred by the statute, cannot, in Connecticut, recover in ejectment by joining with them one whose right is saved—each or any number being capable, by

Where an ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor a stranger entered, and the son went to sea, and was * supposed to have died abroad, within age, it was held that the daughter was not entitled to twenty years to make her entry after the death of her brother (g), but to ten years only after her coming of age, or to twenty after the death of the ancestor. (1). * 902

(g) *Doe v. Jesson*, 6 East, 80. [See *Eaton v. Sanford*, 2 Day, 523. *Bush v. Bradley*, 4 Day, 298. *Thompson & al. v. Smith*, 7 Serg. & Rawle, 209. *Eager & ux. v. Commonwealth*, 4 Mass. Rep. 182. *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 129.]

the law of that State (and Massachusetts) of vindicating his or their own right, without joining the others. *Sanford & al. v. Button*, 4 Day, 310. In jointenancy, if the right of entry as to some is barred by the statute, all are barred. *Aliter*, as to a tenancy in common. *Dickey v. Armstrong*, 1 Marsh. 39. See also *Simpson v. Shannon*, 3 Marsh. 462. *Marsteller & al. v. McClean*, 7 Cranch, 156. *Turner v. Debell*, 2 Marsh. 384.]

(1) [The State is never included in an act of limitations unless expressly named, and is not barred by it. *Commonwealth v. McGowars*, 4 Bibb, 62. *Inhabitants of Sloughton & al. v. Baker*, 4 Mass. Rep. 528. *Weatherhead v. Bledsoe*, 2 Overton's Rep. 352. *Johnson v. Irwin*, 3 Serg. & Rawle, 292. *Harlock v. Jackson*, 1 Const. Rep. 135. *Nimmo's Ex'r. v. Commonwealth*, 4 Hen. & Mun, 57. See a discussion of the common law doctrine on this point, 2 Mason's Rep. 313.]

The local statutes of limitations of the different States do not bind the United States in suits in the national courts, and cannot be pleaded in bar of an action by the United States against individuals. *United States v. Hoar*, 2 Mason's Rep. 311.

Remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made—and hence a plea of the statute of limitations of the State where a contract is made is not a bar to a suit brought in a foreign tribunal to enforce that contract: But a plea of the statute of limitations of the State where the suit is brought is a good bar. *Nash v. Tupper*, 1 Caines' Rep. 402. *Ruggles v. Keeler*, 3 Johns. 263. *Pearsall & al. v. Dwight & al.* 2 Mass. Rep. 84. *Byrne v. Crowninshield*, 17 ib. 55. *Decouche v. Savetier*, 3 Johns. Ch. Rep. 217. *Medbury v. Hopkins*, 3 Conn. Rep. 472. *Graves v. Graves*, 2 Bibb, 207. *Le Roy & al. v. Crowninshield*, 2 Mason's Rep. 151, and see the learned opinion of Mr. Justice Story. *Sed vide Woodbridge v. Austin*, 2 Tyler, 364.

Legacies are not barred by the statute of limitations, 2 Freem. 22. pl. 20. *Isby v. McCrae*, 4 Dessaus. 432. *Ward v. Reeder*, 2 Har. & M'Hen. 154. *Decouche v. Savetier*, ubi sup. See *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 126.

The statute does not apply as a bar to an action against a stockholder in a bank to recover the amount of a dishonoured note of the bank, under a provision of the bank charter making the stockholders personally liable for such note in such case. *Bullard v. Bell*, 1 Mason's Rep. 243. (This case, however, is now pending in the Supreme Court of the United States, on a writ of error.)]

PART
IV.

MALICE.

Legal import
of the term.

MALICE, in legal and technical language, is of two kinds: in numerous instances it means simply the evil inclination and disposition of one who wilfully does that which the law prohibits, without any legal excuse (*h*). In this sense malice has been said to be *un disposition a faire un mal chose* (*i*).

In the same sense, one who being arraigned of felony refuses to plead, is said to stand mute *of malice* (*k*). Again, the statute "*De malefactoribus in parcis* (*l*)" reciting that trespassers did frequently refuse to yield themselves to justice, adds "*imo malitiam suam proseguendo & continuando*," did flee or stand on their defence.

So where a clerk in orders entered into warranty for hire, and refused to take his trial before lay judges *propter privilegium clericale*, then, according to Fleta, the warranty will avail nothing, and *clericus gaolæ pro "malitia" committetur & redimatur* (*m*).

So where one as a *hired* champion entered fraudulently into warranty, he was said to do so *malitiose & per fraudem & mercedem* (*n*).

* 903 * In such cases the term "malicious" imports nothing more than the wicked and perverse disposition of the party who commits the act, and the precise and particular intention with which he did the act, whether he was moved "*ira vel odio vel causa lucri*," is immaterial, he acts *maliciously* in wilfully transgressing the law.

The application of the term "malicious" is strongly illustrated in the case of homicide, where the *malus animus*, which brings the offence within the legal denomination of wilful murder, is frequently to be collected by the Court, as a matter of law, from the circumstances of the case, and is not an inference of fact to be drawn by a Jury, as it must necessarily be whenever malice consists in the *specific intention* actually existing in the mind of the agent, at the time of the act. "Most, if not all the cases of implied malice,"

(*h*) See *Johnson v. Sutton*, 1 T. R. 493. Cro. Car. 271.

(*i*) 2 Roll. R. 461. Fost. 256.

(*k*) 4 & 5 P. & M. c. 4.

(*l*) 21 Edw. I. stat. 2.

(*m*) Fleta, lib. 1, c. 38, s. 8, 9. Fost. 256. The word malice was used in the same general sense by the best Roman authors, and in the civil law. Fost. 257.

(*n*) Bracton de Corona, c. 32. s. 7.

says Sir Michael Foster, "will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as plainly carry in them the indications of a heart regardless of social duty, and fatally bent upon mischief (*o*)."^{*} Malice of this description, is sometimes termed malice *in law*, or *implied* or *constructive malice*; it is nothing more than the evil disposition, which is a necessary inference from the wilful doing of an injurious act without lawful excuse (*p*). Here malice does not depend on the actual intention of the prisoner; he may be guilty of malice prepense in legal * consideration, although he entertained no malice whatsoever against the deceased (*q*).^{* 904}

(*o*) Fost. 257; but even in the case of homicide, malice is frequently a question of fact, depending on the actual intention of the prisoner, and the real state of his mind. *Vide infra*, tit. *Murder*.

(*p*) Malice implied in case of murder, is where the act is attended with such circumstances as can admit of no excuse.

Per Parker, C. J. 10 Mod. 214, 5. So an appeal brought *per malitiam*, was one which was wholly groundless. Per *Ld. Coke*, 2 Inst. 281.

(*q*) See Foster, 256, 7. In cases of appeals of death, it seems formerly to have been held to be unnecessary to use the term malice as descriptive of the offence; it was sufficient to aver that the fact was done *nequiter & in felonia*.

A party may be subject even to an indictment for a breach of the law, although he erred not intentionally, but ignorantly. See *R. v. Picton*, 30 Howell's St. Tr., and Lord Ellenborough's observations there.

Thus magistrates are liable to an indictment for refusing to license a public-house, although they were acting under the advice of able counsel. *R. v. Duke of Norfolk*, as cited by Lord Ellenborough in *R. v. Picton*, 30 Howell's St. Tr. 489. Where his Lordship observed, that, "To assert that no man is to be considered as criminal because he has not acted intentionally, but ignorantly, would be leaving it to every man to say, I will not inform myself, and in consequence of such negligence I shall not be deemed criminal. The subject was very much considered when I was at the bar, in the case of some magistrates of Cumberland, and where it was held that they were not entitled to an acquittal, although their mistake originated in the best advice." *And see R. v. Sainsbury*, 4 T. R. 451. In the same case (*R. v. Picton*, 30 Howell's St. Tr. 489,) Lord Ellenborough also observed, "If the act be unlawful, it is a sufficient ground of conviction, although the party may have thought that he had reasonable and probable ground for committing it; being unlawful, he is chargeable for it by indictment. Malice is the essence of an action for a malicious prosecution; here it is an inference of law from the facts."

If a judge in the ordinary exercise of his jurisdiction commit an error he cannot be prosecuted; but if he commit an error in acting beyond his jurisdiction he is not protected. Per Lord Ellenborough, *Ibid*.
And

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Malice in law.

In numerous instances it is unnecessary to use any allegation of malice in the description of the offence, and in others, where the averment of malice is usual, or even necessary, it is not essential to give evidence to *prove* the averment, unless it consist in the existence of some precise and particular intention in the mind of the agent; or in other words, where malice consists in a principle of malevolence to particulars (*r*), for otherwise it is a mere inference of law; and even where special and particular malice is essential, the fact itself is usually *presumptive evidence* to prove it.

Malice in fact.

In the next place, the term *malice* is frequently used to signify the actual state or disposition of the mind of the agent, with which he did a particular act, as that he did it with a view to prejudice a particular individual, either generally or in some specific manner. In this sense it is usually termed *actual, express, or positive malice*, and perhaps it may not improperly be termed *malice in fact*, in contradistinction to malice in law, where it is a mere inference of law; for it is obvious that wherever malice depends upon an actual state and disposition of mind, its existence is a question of pure fact, although undoubtedly in ascertaining that existence certain presumptions in fact which are recognized by the law, are to be regarded by Juries. This kind of malice seems usually to resolve itself into a question of *intention*, a subject upon which some observations have already been hazarded (*s*).

* 905

A malicious intention in fact is a matter of inference from all the circumstances of the particular case, but nevertheless, the terms, malice and malicious, being technical terms of law, involve, as indeed all other technical expressions do, the application of legal judgment and consideration to the facts as found by a Jury.

Presumptions
as to malice.

The presumptions of law as to malice, in the evidence of malice in particular instances, depend upon considerations of policy and convenience, which greatly affect the nature of the proof, and the effect of malice when proved. In some instances the very existence of malice is wholly

And one who in the exercise of a public function, (as a trustee under a turnpike act,) without emolument, and which he is compellable to execute, acts without malice, according to the best of his skill and diligence, is not liable in respect of consequential damage arising from his act. *Sutton v. Clarke*, 6 Taunt. 29; see also *R. v. Sainsbury*, 4 T. R. 794; but see *Roberts v. Read*, 16 East, 215.

(*r*) Fost. 256.

(*s*) *Supra*, tit. *Intention*.

immaterial ; in other words, the law will decide conclusively in favour of a defendant, notwithstanding his malice or its injurious consequences to the plaintiff. As, where an action is brought for a libel, or words published or spoken by a Judge, juror or witness, in the ordinary course of a judicial proceeding (s). In others, the law will not exclude evidence of malice, but will *presume against* its existence, until it has been established by positive proof, as in cases of libel or slander, where *the occasion* supports such a presumption (t) ; or where the action is expressly founded upon a malicious proceeding, such as a malicious prosecution by a private person, or a malicious conviction by a magistrate (u). In such and similar instances, malice, being the gist of the action, must be established by positive proof, independently of the act itself (x).

In other cases again, where the act of the defendant is unsupported by any presumption of law, supplied in his favour by the occasion and circumstances of the act, which is in itself plainly hurtful and injurious to another, the very act itself supplies evidence of malice, * and the *onus* of ex- * 906
culpation is thrown upon the defendant.

Where a defendant is proved to have done that, the malicious doing of which is prohibited by the law, malice is a *prima facie* inference from the very act, for he must be presumed to have intended to do that which he did, and an *intentional* violation of the law is a *malicious* violation of it (y). The proof of facts in justification, excuse, or alleviation, must be, in such cases, incumbent on the defendant. And where the offence consists not merely in the doing a particular act, but in the doing it maliciously, and with *intent* to effect a *specified criminal object*, evidence that the defendant intended to effect that purpose (z) is in like manner *prima facie* evidence of malice.

It seems to be a general rule, that a gross, unfeeling, and vicious disregard of consequences, however pernicious they may be to society, or however fatal to the individual in particular, is equivalent to express malice, or perhaps,

(s) *Supra*, tit. *Libel*.

(t) See the different instances, *supra*, 862, 3, &c.

(u) *Supra*, 799. 807-8. *Burley v. Bethune*, *infra*. 914.

(x) See tit. *Malicious Prosecution*.

(y) If one doth a greivous mischief voluntarily, the law will imply malice, Kel. 126. Holt, 484. Cro. Car. 131. W. Jones, 198. 1 Hale, 454. Palm. 585. Fost. 255. And see *Farrington's case*, *supra*, 68.

(z) *Supra*, tit. *Intention*.

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to speak more correctly, is strong, if not conclusive, evidence of a specific intention to injure (a).

Such seem to be presumptions of law, in which the Courts in some instances draw the inference; and upon which Juries ought to act, under the direction of the Court, in others.

Where any doubt arises whether the party acted maliciously, or with such a fair and *bona fide* intention as would in law protect him, or whether the particular injury resulted from mere accident, it seems to be a pure question of fact for the consideration of the Jury, who are to decide whether the act was *intentional*, and if so, by what motive the agent was really actuated.

* 907

* MALICIOUS PROSECUTION.

Particulars of
proof.

THE proofs in an action for a malicious prosecution are, 1st, Of the prosecution; 2ndly, Of the defendant's malice, and the want of probable cause; 3dly, Of the plaintiff's damage.

Proof of a pro-
secution by the
defendant.

1st. A *prosecution* by the *defendant* (1), from which the plaintiff has been *discharged*. If the prosecution was in the King's Bench, at the assizes, or quarter sessions, the fact of prosecution and acquittal must be proved in the usual way, by the production of the record, or proof of an examined copy of it (b). It is no objection to this proof, that no order of Court, or fiat of the attorney-general, allowing a copy of it to the party acquitted in a case of felony, is proved (c). It must appear that the plaintiff was *acquitted* of the charge (d); it is not sufficient to prove that the proceeding was stayed by the *nolle prosequi* of the attorney-

(a) *Vide infra*, tit. *Murder*.

(b) *Supra*, Vol. I. See *Clayton v. Nelson*, B. N. P. 13. *Kirk v. French*, 1 Esp. C. 81. *Morrison v. Kelly*, 1 Bl. R. 385. *Post* 919.

(c) *Leggatt v. Tollervey*, 14 East, 302. *Jordan v. Lewis*, 2 Str. 1122. And Ford's MS. [See *The People v. Poyllon*, 2 Caines' Rep. 202. *Mims v. Burt*, 2 Rep. Con. Ct. 308. *Taylor v. Cooper*, *ibid.* 208.]

(d) *Hunter v. French*, Willes, 517.

(1) [A memorial presented to a grand jury (but not acted upon by them) complaining of the conduct of a public officer, will not support an action for a malicious prosecution. *O'Driscoll v. M'Burney*, 2 Nott & M'Cord, 54.]

general (e), otherwise if he had pleaded not guilty, and the attorney-general had confessed it (f); and it is sufficient that the party was acquitted upon a defect in the indictment (g) (2).

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IV.

Proof of a prosecution by the defendant.

Some proof ought to be given of the identity of the plaintiff with the party prosecuted. In order to prove that the defendant was the prosecutor, it may be * desirable to be prepared with the original bill of indictment, for although the names of the witnesses on the back of the bill are no part of the record, it is evidence that they were sworn to the bill (h); but it may be proved that the defendant was a witness, without producing the bill (i); and the indorsement of the party's name as a witness on the bill is no evidence that he was the prosecutor (k). Where however the defendant merely acted as a magistrate, the mere proof of his name on the back of the indictment as prosecutor will not render him liable (l). The proper evidence to establish this fact is, that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses, or was otherwise active in forwarding the prosecution (1). It has been said, that a grand juror may be called to prove that the defendant

* 908

(e) *Goddard v. Smith*, 6 Mod. 262, [*Smith v. Shackelford*, 1 Nott & M'Cord, 36.] for notwithstanding the *nolle prosequi*, fresh process may be sued out upon the indictment. *Ibid.* per Ld. Holt; but it was said that there had been no instance of any further proceeding after a *nolle prosequi*. *Ibid.*

(f) *Ibid.*

(g) *Wicks v. Fentham*, 4 T. R. 247.

(h) Per Holt, C. J. in *Johnson & ux. v. Browning*, 6 Mod. 216.

(i) *Ibid.* per Ld. Holt.

(k) 1 Vent. 47. B. N. P. 14. See also, *R. v. Commerell & al.* 4 M. & S. 203.

(l) *Girlington v. Pitfield*, 1 Vent. 47.

(2) [Where a declaration alleges that the party was acquitted, proof that the grand jury had rejected the bill is not sufficient evidence to support the action for malicious prosecution. *Thomas v. De Graffenried*, 2 Nott & M'Cord, 143. If the plaintiff have been regularly discharged by order of court, after the bill is thus rejected, it may, perhaps, be sufficient. *Ibid.*

(1) [Grand jurors are not liable to an action for malicious prosecution for information given by them to their fellows, upon which a presentment is founded. *Black v. Sugg*, Hardin, 556.]

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Proof of a prosecution by the defendant.

was the prosecutor (*m*) ; this however appears to be doubtful (2).

Where the substance only of the charge contained in the judgment, or information before a magistrate is alleged, it seems that a variance will not be material, unless the charge itself be different.

Variance.

* 909 Where the declaration professed to set out the substance of the indictment, and in specifying the goods, * and their value, used the words *valoris* for *valentie*, it was held, that the variance was not material (*n*).

Where the declaration alleged that the defendant charged the plaintiff before the magistrate with assaulting and beating him, and the charge in fact was for assaulting and striking, the court held, that as the declaration did not profess to describe the warrant, and had stated the charge correctly in substance, the variance was not material (*o*).

So where the declaration for a malicious arrest stated the warrant to be to arrest the plaintiff for an assault with intent to rob *A.* (the informant), and the words of the warrant were "with intent to rob, as he verily believes" (*p*).

Where the declaration alleged that the defendant charged the plaintiff with felony before a magistrate, it was held that the averment was supported by proof of a charge made, stating the *suspicion* of the defendant (*q*).

Evidence that the defendant, upon his application to a magistrate, stated facts which showed the plaintiff to have been guilty of nothing more than a tortious conversion of the defendant's goods, upon which the magistrate issued a warrant to apprehend the plaintiff on suspicion of felony,

(*m*) *Sykes v. Dunbar*, Selw. N. P. This evidence is said to have been admitted by Ld. Kenyon, on the ground that this was a question of fact, the disclosure of which did not involve a breach of the grand jurymen's oath ; but yet it seems, that either the witness must disclose the whole that passed, or the defendant would be precluded from ascertaining, upon cross-examination, the grounds from which the witness drew his general inference that the defendant was the prosecutor.

(*n*) *Johnson & ux. v. Browning*, 6 Mod. 216 ; but it was said, that it would have been otherwise had the indictment been set out in *hæc verba*. Ibid. *Vide supra*.

(*o*) *Byne v. Moore*, 5 Taunt. 187. [1 Marsh. 12. S. C.]

(*p*) But note, that Holt, C. J. said he would save the point ; a juror was afterwards withdrawn.

(*q*) *Davis v. Noak*, 1 Starkie's C. 377. Cor. Ellenborough, C. J. and afterwards by the court of K. B. Bayley, J. *dissent*.

(2) [See *Supra*, 400, & note (1).]

will not support an averment that the defendant imposed the charge of felony upon him (*r*).

If the plaintiff in his declaration set forth the indictment, which contains several charges, it is sufficient * to prove * 910 that some of them were maliciously preferred, although there were good grounds for the rest (*s*).

If the declaration allege an acquittal in bank, it is not proved by evidence of an acquittal of *Nisi Prius* (*t*).

But if the day of acquittal be not averred by way of description of the record, a variance from the day of acquittal alleged will not be material. The declaration averred that *afterwards*, to wit, on the morrow of the Holy Trinity, &c. the plaintiff was in due manner, and by due course of law acquitted. By the record of *Nisi Prius* it appeared that the acquittal took place on Tuesday next after the end of Easter term, and the proof was held to be sufficient (*u*).

(*r*) *Leigh v. Webb*, 3 Esp. C. 165. *Vide etiam, Walters v. Mure*, 1 Chitt. Rep. 507; Post, tit. *Variance*; *Phillips v. Shaw*, 5 B. & A. 964; Post, tit. *Variance*. Where the declaration alleged an information before a magistrate, evidence was offered of an admission by the defendant that he had laid an information before the magistrate, and it appeared from the testimony of the magistrate's clerk, that the practice was to take such information in writing. Bayley, J. rejected the admission, and nonsuited the plaintiff. *Smith v. Walker*, York Sum. Ass. 1821.

(*s*) *Reed v. Taylor*, 4 Taunt. 616.

(*t*) *Woodford v. Ashley*, 11 East, 508. The declaration alleged that the plaintiff on Wednesday next, after 15 days of, &c. in the court of our said Lord the King, before the King himself at Westminster, before the Lord Chief Justice, assigned to hold pleas before the King himself, &c. W. & J. being associated with him, &c. was in due manner, and by due course of law, by a jury of the said county of Middlesex, acquitted. In order to prove this, a copy of the original roll was given in evidence, which stated the finding of the bill of indictment in the K. B., the process issued to bring the party into court, the issue joined, the *venire facias juratores* returnable in Hilary term, the *distringas* returnable in Easter term, the *Nisi Prius* record on the return of the *distringas*, setting out the *postea* (containing the trial, and verdict and acquittal,) and lastly the judgment of the court in bank.

(*u*) *Purcell v. Macnamara*, 9 East, 157, overruling the case of *Pope v. Foster*, 4 T. R. 590. And see *R. v. Hucks*, 1 Starkie's C. 521; where on an indictment for perjury, alleged to have been committed in the defendant's answer to a bill of discovery filed in the Exchequer, it was alleged that the bill was filed on a day specified, and it was held to be no variance, although the bill was intitled of a preceding term. And see *R. v. Payne*, Cor. Ld. Kenyon, Westm. after Mich. 29 Geo. III., where a similar variance was held to be immaterial. It is otherwise where the day is stated as *descriptive* of the record, or where it is made material by the averment of *prout*

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IV.Malicious
charge before
a magistrate.

* 911

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpœna duces tecum*, to produce the proceedings. If the information was laid by the defendant, his taking the oath, and hand-writing, should be proved, as also the issuing the warrant to the constable, &c. the warrant must also be produced and proved, and evidence must be given of the apprehension and *detention of the plaintiff under the warrant, and his ultimate discharge must also be shown (1).

Proof of ma-
lice, &c.

Where evidence was given of the loss of the warrant, parol evidence of its contents was admitted without proof of the information (x).

2dly, *Malice and the want of probable cause*.—If a party prosecute another on a criminal charge, it is a rule of law, which seems to be founded upon principles of policy and convenience, that the prosecutor shall be protected in so doing, however malicious his private motives may have been, provided he had probable cause (y) for preferring the charge (2).

This protection appears to be not only one of convenience, but of justice, or even of necessity, when it is considered how often it happens that the facts upon which a prosecution is properly founded are confined to the know-

patet per recordum. See 9 East, 160. And *Green v. Rennett*, 1 T. R. 656, where in an action against an attorney for negligence in not prosecuting a debtor of the plaintiff to judgment, the declaration *misdescribed* the return of the writ on which the debtor had been arrested. See *R. v. Lookup*, cited 1 T. R. 240. *R. v. Pip-
pett*, *ibid.* 235. *Phillips v. Shaw*, 4 B. & A. 435.

(x) *Newsam v. Carr*, 2 Starkie's C. 70. Cor. Wood, B. Note, it did not appear that any information had been taken, and yet it seems that it is to be presumed in a case of felony that one has been taken.

(y) 1 T. R. 520. 1 Salk. 14, 15, 21; 5 Mod. 394, 405. 1 Vent. 86. Carth. 415. 12 Mod. 208. Holt, 8.

(1) [The original warrant issued by a justice on a charge of felony, with the acquittal of the person charged, indorsed and signed by the justices who sat at the trial, is evidence of the acquittal. *Dougherty v. Dorsey*, 4 Bibb, 207.]

(2) [That malice and want of probable cause must both be established against the defendant, in order to support an action for a malicious criminal prosecution or a vexatious civil suit, see *Lyon v. Fbr*, 2 Browne's Rep. Appx. 69. *Munns v. Dupont & al.* *ibid.* 42. *Kelton v. Bevins*, Cooke's Rep. 90. *Marshall v. Bussard*, Gilmer, 9. *Bell v. Graham*, 1 Nott & M'Cord, 278. *White v. Dingley*, 4 Mass. Rep. 433. *Lindsay v. Larned*, 17 ib. 190. *Vanduzor v. Linderman*, 10 Johns. 106. Yelv. 105. *a.* note (2).]

ledge of the prosecutor alone ; and if this proof were not to be required on the part of the plaintiff, every prosecutor would in such a case be left exposed to an action, against which he might have no * defence (z) ; if malice were to be inferred from the apparent want of probable cause. * 912

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IV.

Whether the circumstances of a particular case afforded to the accuser a *probable cause* for making the accusation, is a question of law, which arises upon the facts established in evidence (a). Malice and the want of probable cause.

Where upon an indictment for a malicious prosecution for perjury, it appeared that part of the affidavit on which perjury had been assigned was falsely sworn, but that there was no probable cause for some assignments of perjury, on

(z) See *Ld. Kenyon's* observations in *Sykes v. Dunbar*, 1 Camp. 202, in note ; and in *Smith v. Macdonald*, 3 Esp. C. 7. These reasons do not, as has been seen, apply to a case where a party makes an extra-judicial charge against another.

(a) See *Candell v. London*, cited 1 T. R. 520, per Buller, J. In *Johnstone v. Sutton*, 1 T. R. 543, it is said, that the question of probable cause is a mixed question of law and fact ; whether the circumstances alleged to show it probable or not probable existed, is a matter of fact ; but whether, supposing them to be true, they amount to a probable cause, is a question of law (1), and that upon this distinction, the case of *Reynolds v. Kennedy*, 1 Wils. 232, was decided. See also B. N. P. 14, which cites *Golding v. Crowle*, Mich. 25, G. 2, [Sayer, 1. S. C.] where a verdict for the plaintiff was set aside, not as a verdict against evidence, but as a verdict against law, the judge having reported that there was probable cause. See also the judgments of *Ld. Mansfield* and of *Ld. Loughborough*, in *Johnstone v. Sutton*, 1 T. R. 544 ; 2 T. R. 231.

So where probable cause operates as a defence in an action of trespass, if the facts be pleaded, the court can decide whether or no there was a probable cause sufficient to justify the defendant. The rule is one of legal policy, which protects a party to a certain extent, notwithstanding his malicious intention ; for although he may intend ill, yet still good may arise by encouraging the prosecution of offenders) the application of the rule must evidently be a question of law, for a jury cannot say how far a mere rule of law is to operate. See tit. *Law & Fact*, Part III. 425. & seq. *Hill v. Yates*, 2 Moore, 80. *Brooks v. Warwick*, 2 Starkie's C. 389. *Isaacs v. Brand*, ib. 167. *Supra*, 820.

(1) [*Leggett v. Blount*, 2 Taylor, 123. *Ulmer v. Leland*, 1 Greenleaf, 134. *Munns v. Dupont & al.* 2 Browne's Rep. Appx. 42. *Acc.*

In *Crabtree v. Horton*, 4 Munf. 59, it was held that the court ought not to instruct the jury that probable cause is proved, but should leave the weight of the testimony to the jury, unless the facts are agreed by the pleadings, or submitted to the court by the parties. See also *Maddox v. Jackson*, 4 Munf. 462.

The court of Tennessee, in the case of *Kelton v. Bevins*, Cooke's Rep. 90, were divided in opinion, on the question whether probable cause be a point for the decision of the jury or the court.]

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IV.

* 913
Malice and the
want of proba-
ble cause.

some of the transactions contained in the affidavit, it was held that the action was maintainable (b), for there being no probable cause for * some of the charges in the indictment, it was preferred without probable cause (c).

The fact of *malice* which is a question for the jury (d), is usually inferred from the want of any probable excuse for the prosecution (e). No evidence of malice can be more cogent than the proof that the defendant *knew* that the plaintiff was innocent.

It is invariably necessary in an action of this nature to give some positive evidence, arising out of the circumstances of the prosecution, to show that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge, for, as was observed in the case of *Purcell v. Macnamara* (f), the prosecution may have been commenced, and abandoned from the purest and most laudable motives (1).

Thus it is not enough to show, that on an indictment of the plaintiff by the defendant for perjury, the former was acquitted upon the trial, on failure of the prosecutor's ap-

(b) *Reed v. Taylor*, 4 Taunt. 616.

(c) Per Gibbs, C. J. *Reed v. Taylor*, 4 Taunt. 616.

(d) See *Johnstone v. Sutton*, 1 T. R. 543. [*Ray v. Law*, 1 Peters' Rep. 210. *Munns v. Dupont & al.* 2 Browne's Rep. Appx. 42. *Semner v. Wilt*, 4 Serg. & Rawle, 19.]

(e) *Inclendon v. Berry*, 1 Camp. 203. n. *Saville v. Roberts*, 1 Salk. 14; 1 Ld. Ray. 374. [*Kerr v. Workman*, Addison's Rep. 270.]

(f) *Purcell v. Macnamara*, 9 East, 361; *Sykes v. Dunbar*, cited 9 East, 363, in the note, where Ld. Kenyon ruled, that it was not sufficient for the plaintiff to show his acquittal, without going farther, and giving evidence of malice in the defendant.

(1) [The discharge of the plaintiff, by the examining magistrate, before whom he is brought on a warrant, is *prima facie* evidence of want of probable cause, and throws upon the defendant the burden of showing probable cause. *Johnston v. Martin*, 2 Murphey, 248. *Secor v. Babcock*, 2 Johns. 203.]

A conviction of the plaintiff, by a justice having jurisdiction of the offence, is conclusive evidence of probable cause, in Massachusetts, although he was acquitted on an appeal. *Whitney v. Peckham*, 15 Mass. Rep. 243. In Virginia, a magistrate's committing a person accused of felony, or binding him in a recognizance to appear at court and answer the charge, is sufficient evidence of probable cause, though he was acquitted by the court; unless he prove by other evidence that the prosecution was without any probable cause. *Maddox v. Jackson*, 4 Munf. 462. See *Sterling v. Adams & al.* *infra*, 920, note (1).]

pearance when called (*g*); even although the facts lay within the defendant's knowledge, who, had there been the least foundation for the prosecution, might have proved it (*h*).

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* Or to prove that the bill was thrown out by the grand jury (*i*), or that the defendant, after charging the plaintiff on oath with an assault, omitted to prefer an indictment (*k*). * 914
Proof of malice.

Where the prosecutor has abandoned the prosecution without giving any evidence, and it is proved that the defendant was actuated by *malicious motives* in preferring the bill, although some evidence must still be given of the want of probable cause, slight evidence will be sufficient (*l*).

In an action against a magistrate for a malicious conviction, the question is not whether there was probable cause in fact for convicting, but whether *he* had any probable cause for convicting, and for this purpose, * what * 915
passed before him upon the hearing is not only proper, but essential evidence with a view to the question of malice (*o*).

The proof of malice in this action, (as has already been observed) usually results from the want of probable cause,

(*g*) *Ibid.* [See also *Shock v. M'Chesney*, 4 Yeates, 507.]

(*h*) The circumstance, that in the particular case the facts are peculiarly within the knowledge of the prosecutor, and the proof of them within his reach, would clearly be an insufficient reason for departing from the general rule, which seems to be founded partly on the difficulty under which a defendant must often labour, in proving by other witnesses the cause which he had for instituting the prosecution. In Buller's *Nisi Prius*, 14, it is laid down, that where the facts are in the knowledge of the defendant himself, he must show a probable cause, though the indictment has been found by a grand jury, or the plaintiff shall recover, without proof of express malice; for this position, the case of *Parrott v. Fishwick*, Lond. Sitt. after Trin. T. 1772, is referred to; but from the note of this case, given 9 East, 362, it appears that where a defendant had been acquitted by verdict, Ld. Mansfield, in summing up, said, "That it was not necessary to prove express malice; for if it appeared that there was no probable cause that was sufficient to prove an implied malice, which was all that was necessary to be proved to support this action. For in that case all the facts lay within the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power, and incumbent on him to prove it." Verdict for the plaintiff, damages 50*l*. It is observed by Mr. East, in the note referred to, that it was perfectly consistent with the summing up, that the plaintiff had given *prima facie* evidence to negative any probable cause.

(*i*) *Byne v. Moore*, 1 Marsh. 12.

(*k*) *Wallace v. Alpine*, 1 Camp. 204. n.

(*l*) Per Le Blanc, J. *Inclendon v. Berry*, 1 Camp. 203, in note.

(*o*) *Murley v. Bethune*, 5 Taunt. 580. 1 Marsh. 220. S. C. [See *Kennedy v. Terrill*, Hardin, 490. *Muse v. Vidal*, 6 Munf. 27.]

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Proof of malice.

which when once established affords the strongest presumption of malice (*m*). Evidence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication of the proceedings, is properly adduced to prove malice (*n*) (1). It seems also, that the plaintiff may give in evidence the proof adduced by the defendant on the trial of the charge (*o*).

Where the defendant, a bank inspector, had procured the plaintiff, a tradesman, to be taken into custody on a charge of having in his possession a forged bank-note, without legal excuse, because he had refused, after paying the amount to the person to whom he had paid it away, to deliver it up to the inspector. *Ld. Ellenborough* held that the pressing a commitment under such circumstances was such a *crassa ignorantia* that it amounted to malice (*p*).

* 916 * The defendant may give in evidence any facts which show that he had *probable cause* for prosecuting, and that he acted *bona fide* upon that ground of suspicion. It is no answer to the action that the defendant acted upon the opinion of counsel, if the statement of facts upon which the opinion was founded was incorrect, or the opinion itself unwarranted (*q*) (2).

(*m*) See 5 Taunt. 583.

(*n*) 1 Str. 691.

(*o*) B. N. P. 13, 14.

(*p*) *Brooks v. Warwick*, (2 Starkie's C. 389.) The plaintiff had taken the note in the usual course of business, and paid it in the usual course to *B*. The note being stopped at the bank, was stamped as a forgery, and brought by an inspector to the plaintiff. The plaintiff paid the amount to *B*. and refused to give it up to the inspector, insisting on his right to retain it. The inspector, without any ground for suspicion, charged the plaintiff with feloniously having the note in his possession, without lawful excuse. The case was very pertinaciously pressed on the part of the defendant, although *Ld. Ellenborough* had, early in the cause, expressed a strong opinion on the subject, and left it to the jury upon the ground of malice. The jury found for the plaintiff, damages, 50*l*.

(*q*) *Hewlett v. Crutchley*, 5 Taunt. 277.—*Supra*, 823, note (*o*). *Infra*, 923.

(1) [Where the plaintiff gives evidence of the conversation of the defendant to show malice, the defendant may prove by the committing magistrate what he swore before him. *Guerrant v. Tinder*, Gilmer, 36. And where the magistrate records the prosecutor's testimony, the plaintiff may give such parol evidence of this testimony as is consistent with the written statement, and tends to a more exact specification. *Watt v. Greenlee*, 2 Murphey, 246.]

(2) [The defendant may give in evidence what he, as prosecutor, swore on the trial of the indictment. *Scott v. Wilson*, Cooke's Rep. 315. *Moodey v. Pender*, 2 Hayw. 29.]

If it appear that the jury upon the trial of the plaintiff, entertained doubts upon the evidence, and deliberated as to his guilt after the case was concluded, the fact is, it seems, evidence of a probable cause (r) (2).

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Proof of malice.

It is obviously of importance to prove that a felony has been committed (s), and to be prepared with proof of such circumstances as tend to throw suspicion on the plaintiff (t) (3). This, however, would probably be deemed to be insufficient in case of express proof that the defendant knew that the prosecution was without foundation.

* In the case of *Johnson v. Browning* (u), where it appeared that no one was present at the time of the supposed robbery but the wife of the defendant in the action, Ld. Holt admitted evidence of what she swore at the trial of the indictment; but it is obvious that this was done under the impression that it was incumbent on the defendant to establish the fact of probable cause, although no evidence were given to establish the negative. * 917

Where the plaintiff has been arrested on a charge of larceny, it has been doubted whether the defendant, after

(r) In *Smith v. Macdonald*, 3 Esp. C. 7, Ld. Kenyon held, that if the jury paused before they acquitted the plaintiff upon his trial for the offence, he should hold that there was probable cause for the prosecution. It does not appear, whether in that case the evidence rested upon the testimony of the prosecutor or the defendant in the action. It is also to be observed, that there was no evidence to negative probable cause, a circumstance in itself sufficient to warrant a nonsuit, *supra*, 913. See also, *Lilwal v. Smallman*, Selw. 946; *Golding v. Crowle*, B. N. P. 14. [Sayer 1. S. C.]

(s) In *Johnson v. Browning*, 6 Mod. 216, Ld. Holt seems to have considered this proof to be essential to the defence; but it seems to be a good defence to prove warrantable grounds for suspecting the guilt of the plaintiff, although no felony was committed. See *Samuel v. Payne*, Dougl. 359; *Ledwith v. Catchpole*, Cald. 291; *supra*, 821.

(t) See *Knight v. German*, Cro. Eliz. 70. 134. *Pain v. Rochester*, Cro. Eliz. 871.

(u) 6 Mod. 216. In B. N. P. 14, citing *Cobb v. Carr*, it is said, that the defendant's evidence of what he swore upon the trial of the indictment is evidence; this, however, does not seem to be warranted, for if the principle of necessity operated in such a case, the effect would be to admit the testimony of the defendant himself, by which means the plaintiff would have the benefit of a cross examination.

(2) [See *supra*, 913, note (1).]

(3) [In an action for malicious prosecution, papers taken by a magistrate from the person of the plaintiff, and used upon an indictment against him, and which are in the possession of the defendant, may be read upon the trial. *Munns v. Dupont & al.* Wharton's Digest, 6.]

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Damages.

having given some evidence of probable cause, can give evidence to prove that the plaintiff was a man of bad character (*x*); yet it seems that such evidence affords no presumption of probable cause in the particular instance (*y*).
 3dly, *The damage sustained*.—The plaintiff may prove in aggravation of damages the length of imprisonment, his expenses, situation and circumstances. The peril and jeopardy in which a man's life and liberty are placed by a malicious prosecution, or the prejudice to his fame and reputation, constitute a sufficient ground * of action (*z*); so although neither his fame nor liberty be affected, if he has been put to needless expense to defend himself (*a*).
 * 918 In the estimate of damages, the costs incurred by the plaintiff are to be estimated as between attorney and client (*b*) (1).

If a man be falsely and maliciously indicted of a crime which is a scandal to him, and hurts his fame, an action lies, although the indictment be insufficient, or an *ignoramus* be found (*c*); for although no expense may have been incurred, the mischief of the slander has been effected (*d*).

In a joint action against several the jury cannot assess several damages (*e*).

(*x*) In the case of *Rodriguez v. Tadmire*, 2 Esp. C. 721, Ld. Kenyon admitted general evidence to that effect. In *Newsam v. Carr*, 2 Starkie's C. 69, Cor. Wood, B. where a witness was asked whether the plaintiff's house had not been searched on former occasions, and whether he was not a man of suspicious character. Wood, B. overruled the question, observing, that in actions of slander such evidence would be admissible to mitigate the damages, but that in the present case it would afford no evidence of probable cause.

(*y*) Ibid. [See *Gregory v. Thomas*, *supra*, 366, note (1).]

(*z*) *Savil v. Roberts*, B. N. P. 13.

(*a*) B. N. P. 14. This was formerly doubted, *ibid*. But it has been decided, that such an action lies by the husband for the expense of defending his wife, B. N. P. 13. *Jones v. Gwynn*, 10 Mod. 214; Gilb. 185; 1 Salk. 15.

(*b*) *Sandback v. Thomas*, 1 Starkie's C. 306. But see *Sinclair v. Eldred*, 4 Taunt. 7.

(*c*) *Savil v. Roberts*, B. N. P. 13; *Chambers v. Robinson*, 1 Stra. 691.

(*d*) Ibid.

(*e*) *Lowfield v. Banckcroft*, 2 Str. 910; B. N. P. 15. 93. *Contra*, *Lane v. Santeloe*, B. N. P. 15. 1 Stra. 79.

(1) [This action cannot be maintained for the ordinary costs and expenses of a defence, without an arrest or some special damage. *Potts v. Imlay*, 1 Southard's Rep. 330. No action lies to recover of a prosecutor the money expended by the plaintiff in defending against an indictment. *Fleet v. McIntire*, 1 Coxe's Rep. 161.]

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In an action for a *malicious arrest*, the plaintiff must be prepared to prove the affidavit made by the defendant, either by means of the affidavit itself, or proof of an examined copy; the former, it is said, is the better course (*f*). He must also prove an examined copy of the writ and return, and produce and prove the warrant of the sheriff made by virtue of the writ (*g*); and the arrest and detention under it. The official *return made by the sheriff is * 919 evidence of the fact for either party (*h*).

Malicious arrest. Proof of the arrest.

Where the plaintiff alleged that he was arrested under and by virtue of a plaint, for debt, in the sheriff's court, it was held to be proved by evidence, that the plaint was entered, and that the officer in consequence arrested the plaintiff, having first received a paper in the nature of a warrant, containing the parol directions of the sheriff, which were good by custom, although the stat. 12 Geo. I. requires an affidavit of debt, which had been made (*i*).

The determination of the action must also be proved by means of an examined copy of the entry on the record (1). Proof of the rule of court to discontinue, and of the taxation and payment of costs, is sufficient evidence of the determination of the action (*k*). But it is said that proof of an order made by a judge to stay proceedings is insufficient, although the costs have been taxed and paid (*l*).

Determination of the action.

(*f*) Peake's Ev. 330. See *Webb v. Herne*, 1 B. & P. 281, where the plaintiff, having in an action against the sheriff alleged that I. S. was arrested under a writ indorsed for bail, by virtue of an affidavit filed of record, it was held that the allegation must be proved.

(*g*) As to this proof, see tit. *Sheriff*.

(*h*) *Gyfford v. Woodgate*, 11 East, 297, *supra*, Vol. I. p. 284. *Contra*, *Lloyd v. Harris*, Peake's C. 174. It is not sufficient to prove the arrest, and return of *cepi corpus*, without proof of the warrant, *Lloyd v. Harris*, Peake's C. 174. See *Drake v. Sykes*, 7 T. R. 113. [2 Phil. Ev. 116.]

(*i*) *Arundell v. White*, 14 East, 216.

(*k*) *Bristow v. Haywood*, 1 Starkie's C. 48. [S. C. 4 Camp. 213.]

(*l*) *Kirk v. French*, 1 Esp. C. 80, on the ground that the evidence is not the best which the case admits of; but note, that a juror was withdrawn in that case, and Ld. Kenyon seems to have entertained doubts. An order of the Lord Chancellor for superseding a commission is not evidence in an action for maliciously suing it out, to show that it has been superseded, a *supersedeas* under the great seal must be produced, *Poynton v. Forster*, 3 Camp. 58, [and Mr.

(1) [In an action for a malicious prosecution in a foreign country, it is not indispensably necessary to produce a copy of the record of proceedings there, but the plaintiff may prove them by other evidence. *Young v. Gregory*, 3 Call, 446.]

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* 920

Variance.

Where it appeared to be the practice in the sheriff's court in London, upon the abandonment of a suit by the plaintiff, to make an entry in the minute-book of "withdrawn" by the plaintiff's order, opposite to the entry of the plaint, it was held that proof of such an * entry was sufficient to prove the determination of the suit (o).

Where the declaration in stating a judgment by default, stated "and thereupon it was considered by the said court of K. B. that the plaintiffs should take nothing by their said writ, but that *they and their pledges to prosecute should be in mercy, &c.* as by the record and proceedings thereof, &c. now fully appear, and the said action was and is thereby wholly ended and determined," it was held to be no variance, although the record produced wanted the words "and their pledges to prosecute" but only an &c. and that as the substance of the allegation was the discontinuance of the former suit, those words might be rejected as surplusage (m).

Where the declaration alleged a plaint against the defendant at the sheriff's court in London, it was held to be supported by proof of a plaint before one of the sheriffs (n).

It lies on the plaintiff to prove that the arrest was malicious, and without reasonable or probable cause (1). It is

Howe's note to that case.] Vid. *supra*, 722; and *Barton v. Miles*, Cas. temp. Hardw. 125, 6.

(o) *Arundell v. White*, 14 East, 216.

(m) *Judge v. Morgan*, 13 East, 547.

(n) *Arundell v. White*, 14 East, 216. So the Assize Courts may be stated indifferently to be held, either before both the judges of Assize, or before the one who in fact sat at the time; per Lord Ellenborough, *ibid*; and *R. v. Alford*, Leach's C. C. L. 179.

(1) [See *Supra*, 911, note (2). Demanding excessive bail when there is a good cause of action, or holding to bail when there is no cause of action, if done for the purpose of vexation, entitles the party to an action. *Ray v. Law*, 1 Peters' Rep. 210. So maliciously (and for the purpose of vexing, distressing and impoverishing the plaintiff) directing an officer to levy a much greater sum than is due on a judgment obtained by the defendant against the plaintiff, and causing the officer so to levy and sell the plaintiff's goods to an amount exceeding the sum due. *Somner v. Will*, 4 Serg. & Rawle, 19.

Pleading the truth of the words in justification, in an action of slander, does not so admit probable cause as to preclude the party so pleading from showing the want of it in an action, for a vexatious suit, against the party suing him. *Sterling v. Adams & al.* 3 Day, 411. Where the declaration is for a vexatious suit and holding to bail in one action only, the records of other actions brought by the same defendant against the same plaintiff cannot be given in evidence. *Ray v. Law*, 1 Peters' Rep. 207. Where the declaration in such action states that the sum demanded as bail in the vexa-

not sufficient to show that the action was *non-prossed* (o), or that the defendant in the former action took a less sum out of court (p); or that an action on a bill in respect of which the present plaintiff had been discharged by the laches of the present defendant, had been discontinued (q).

It is evidence of malice that the defendant sued out * the writ after a release of the debt (r); but it is not suf- * 921 ficient to show that the writ was sued out after payment of the debt, to the defendant's agent, upon an affidavit made before the payment without proof of malice (s).

It seems that if the plaintiff allege that the defendant had *Malice.* no cause of action against him, upon which by law he could be held to bail, proof of a cause of action, to a bailable amount, would be an answer to the action, and that the plaintiff ought to have declared specially (t). But where the declaration was in that form, and it appeared that the defendant's affidavit was for money had and received, and money paid, and that he had a claim to the amount of 100*l.* for commission on the sale of timber, and that on the general balance of account he was indebted in a large sum to the plaintiff, the action was held to be maintainable (u).

Where the specific sum for which the plaintiff was arrested was really due to the defendant, no action is maintainable, although the defendant when he made the arrest owed the plaintiff a larger sum, for there was not only a probable but a real ground of action (x).

It has been held at *Nisi Prius*, that one, who as arbitra-

(o) *Sinclair v. Eldred*, 4 Taunt. 7. [See *Ray v. Law*, 1 Peters' Rep. 210.]

(p) *Jackson v. Burleigh*, 3 Esp. C. 34. Cor. Ld. Kenyon.

(q) *Bristow v. Haywood*, 1 Starkie's C. 48. 4 Camp. 213.

(r) *Waterer v. Freeman*, Hob. 267.

(s) *Gibson v. Chaters*, 2 B. & P. 129. Note, in that case the Court were of opinion, that the circumstances excluded the inference of malice. *Vide infra*, 922, note (a).

(t) *Wilkinson v. Mawbey*, cited 1 Camp. 297; *Wetherden v. Embden*, 1 Camp. 295; *Savil v. Roberts*, 1 Salk. 14.

(u) *Wetherden v. Embden*, 1 Camp. 295. Cor. Sir J. Mansfield.

(x) *Brown v. Pigeon*, 2 Camp. 594. Cor. Ld. Ellenborough. In such a case the proceeding is a fit subject of application to a Judge. *Ibid.* See *Dr. Turlington's case*, cited 4 Burr. 1996.

tious suit, was indorsed on the writ, no other evidence but the indorsement can be given in evidence to show that such bail was demanded. *ibid.* Sed vide *Munns v. Dupont & al.* Wharton's Digest, 5.]

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* 922 tor in an action between the parties has seen their books of accounts, and awarded that nothing * was due, is not a competent witness for the plaintiff in an action for a malicious arrest, on the ground that he has had access, by consent, to documents which the present defendant, the plaintiff in the former action, could not have been compelled to produce (y).

Damage.

The plaintiff must prove the arrest, and the expenses to which he was put (z). Where a bailable writ was sued out against the plaintiff by mistake, and the bailiff to whom the warrant was delivered to be executed merely requested payment of the money, informing him that he had a writ out against him, and on the mistake being discovered, the plaintiff was told that he need give himself no further trouble, but the plaintiff afterwards incurred expense by putting in bail above, it was held that the action was not maintainable (a).

Defence.

* 923 It is competent to the defendant, for the purpose of rebutting the inference of malice, to show that he acted under professional advice, although it was unfounded in law; the defendant after taking the present plaintiff's bail in execution; arrested the plaintiff on a *testatum ca. sa.* after notice from the plaintiff's attorney that the proceeding was irregular; the defendant proved * that he had acted upon *Higgin's* case (c), and on the opinion of a special pleader, and the plaintiff was non-suited (d).

(y) *Habershon v. Troby*, 3 Esp. C. 38. *Qu. tamen.*

(z) He cannot, it is said, recover any damages for extra costs, *Sinclair v. Eldred*, 4 Taunt. 7; *tam. qu.* and *vid. supra*. 918. (b).

(a) *Bieten v. Burridge*, 3 Camp. 139. See *Arrowsmith v. Le Mesurier*, 2 N. R. 211. In general, an action does not lie for bringing an action without good ground, unless it be done maliciously with intent to imprison the party for want of bail, or to do some special prejudice. *Per Cur. Savil v. Roberts*, B. N. P. 13; *Purton v. Honor*, 1 B. & P. 205. And an action will not lie against a party for neglecting to countermand a writ, after payment of debt and costs, unless it be alleged to have been done maliciously, *Page v. Wiple*, 3 East, 313; *Scheibel v. Fairbain*, 1 B. & P. 388; and if in such a case it be incumbent on the party suing out the writ, to countermand it, what shall be a reasonable time for so doing is a question of law. 1 B. & P. 388. [See *Vail v. Lewis & al.* 4 Johns. 450.]

(c) Cro. J. 320; 2 Bulst. 68 p 10 Vin. Ab. 578.

(d) *Snow v. Allen*, 1 Starkie's C. 502. [S. P. *Somner v. Wilts*, 4 Serg. & Rawle, 19.]

MALICIOUS INJURIES, INDICTMENTS FOR.

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UPON an indictment for shooting at or cutting another, with intent to murder, or maim him, or to do him some grievous bodily harm (*e*), whether the act was done by the prisoner with the particular intention wherewith it is charged to have been done, is, as in other cases of *specific* malice and intention, a question * for the Jury. Their inference * 924 upon this important point, as in other cases of malicious intention, must be founded upon a consideration of the situation of the parties, the conduct and declarations of the prisoner, and above all on the *nature* and *extent* of the violence and injurious means which he has employed to effect his object (1). For maliciously cutting, &c.

In estimating the prisoner's real intention, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule, that a man's acts and intentions are to be inferred from the means

(*e*) Under the stat. 43 G. 3, c. 58, s. 1. A striking on the face with the sharp claw of a hammer, by which the face was cut, has been held to be within the act, *Atkinson's* case, York Spring Ass. 1806. Burn's Jus. 295, 23d edition. So the cutting of part of the skull by means of an instrument adapted to the purposes of prizing open doors, was held to be within the statute, a piece of the skull, according to the evidence having been taken out, as if sawed out, not *broken* out, but *cut* out, *R. v. Hayward* or *Harwood*, O. B. Jan. 1805; and afterwards before the Judges, 1 Burn's J. 294, 23d edit.

The intent there was to resist the lawful apprehension of the prisoner; and the Jury found that the intent was not to *cut* but to *break or lacerate* the head. The Judges held that the conviction was right, and the prisoner was executed.

In *Adams's* case, O. B. Sess. 1808, and afterwards before the Judges, it was held that the striking with a square iron bar was not within the statute; but there the wound was not an *incised wound*, but contused and lacerated. It has been said, that in a case before Dallas, C. J. and Burton, J. at Chester, 5 Ev. St. part V. c. 4, p. 334, note (*z*); it was held that a blow with the handle of a windlass was not within the act, although it made an *incised* wound; but in *Atkinson's* case above referred to, the *nature of the wound*, and not of the *instrument*, seems to have been considered to be the proper test of decision. The shooting at another with a pistol loaded with powder and wadding only, is within the act, if it be fired so near the person that it would probably kill, or do some grievous bodily harm, *R. v. Kitchen*, Bridg. Sum. Ass. 1705; and afterwards by the Judges, 1 Burn's J. 293, 23d edit.

(1) [See *Pennsylvania v. M'Birnie*, Addison's Rep. 30. *Respublica v. Langcake & al.* 1 Yeates, 415.]

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Proof of intention.

which he uses, and the acts which he does (e). If with a deadly weapon he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results that his mind and intention was to destroy.

It is not however essential to the drawing such an inference that the wound should have been inflicted on a part where it was likely to prove mortal, such a circumstance is merely a simple and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it could not have proved mortal (f), provided the criminal intention can be clearly inferred from other circumstances.

In the case of an attempt to poison, evidence of former and also of subsequent attempts of a similar nature are admissible.

* 925 * Where the cutting was laid with intent to do some grievous bodily harm, and the Jury found that the act was done with intent to resist a lawful apprehension of the prisoner, and with *no other intent*, it was held by the Judges that the conviction could not be supported (g).

Where the act is charged to have been done with intent to resist a lawful apprehension, the right of the prosecutor to arrest must be proved by the production and proof of the warrant, or other authority (h).

(e) See tit. *Intention—Malice—Murder*.

(f) *R. v. Case*, York Summer Ass. 1820. Cor. Park, J. who said, that it had been so held by the Judges. See *R. v. Akenhead*, Holt's C. 469. It is obvious that a case may fall within both the letter and the spirit of the statute, although from *accident*, or from *ignorance* the prisoner has not succeeded in reaching a vital part.—*Supra*, tit. *Intention—Malice*.

(g) *R. v. Marshall & others*, Surrey Spring Assizes, 1818. Cor. Wood, B. and afterwards by the Judges. The Jury in this case negatived any *other intent*; and therefore the case differs most essentially from that of *R. v. Cox*, above cited, p. 783; where, although it seems that the primary intention of the prisoner probably was to commit a rape, yet the Jury found that he did by cutting intend to do some grievous bodily harm.

(h) *R. v. Dyson*, 1 Starkie's C. 246, Cor. Le Blanc, J. York Spring Ass. 1816; there the prisoner having cut A. B. on the cheek, the prosecutor, and several others who were *not present* at the transaction, went *without any warrant* to the prisoner's house to apprehend him, and he then wounded the prosecutor, and Le Blanc, J. held, that to enable a private person to apprehend in such a case, he must either have been present when the offence was committed, or must be armed with a warrant, this branch of the statute being intended to protect officers and others armed with authority

* A variance from the particular instrument, or poison alleged to have been used, does not appear to be material (i).

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An indictment for striking and cutting is not supported by evidence of stabbing (k). Variance.

Upon an indictment for administering a noxious substance to a woman quick with child, with intent to procure abortion, it is essential to prove that she was quick with child at the time (l). But where the indictment * charged * 927

in the apprehension of persons guilty of robberies or other felonies.— Note, that it did not appear in the above case that the first cutting amounted to a felony, or that the wound was likely to be mortal. *Vide supra*, 823, 4.

Where a private person arrests for felony, a notification of his purpose must be given before he can legally arrest. *Infra*, tit. *Murder*.

Where the prosecutor, whose property had been stolen, found it concealed in an adjoining field, and waited at night to detect the thief, and when he came and had lifted up the bag containing the property, seized him without any previous notification, whereupon the prisoner cut the prosecutor, it was held that for want of previous notification the case was not within the statute. (*Rickett's case*, Cor. Lawrence, J. 3 Camp. 68.) But where in a case somewhat similar, the goods had been concealed by the thief in an out-house, and the owner, together with a special constable under the Watch and Ward Act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and another came at night and removed the goods from the place where they were deposited, and upon an attempt to apprehend them the prisoner fled and was pursued by the owner of the goods, who cried out after him several times in a loud voice, *stop thief*, and on being overtaken, the prisoner drew a knife with which he cut the hands of the prosecutor, and made many attempts to cut his throat, the prisoner was convicted and executed. *R. v. Robinson*, Cor. Wood, B. Lancaster.

(i) *Vide tit. Murder.—Variance.* Starkie's Crim. Pleadings. *R. v. Phillips*, 3 Camp. 75, where on an indictment for administering a decoction of savin to a woman with child, but not quick with child, with intent to procure a miscarriage, it was held by Lawrence, J. to be unnecessary to prove either that the substance administered was savin; for if the prisoner believed at the time that the substance which he administered would procure a miscarriage, and administered it with that intent, the case was within the statute; and it is immaterial whether the drug was savin or not, or whether it was capable of procuring a miscarriage, or whether the woman was with child or not.

(k) *R. v. Macdermot*, Notting. Lent. 1818. Cor. Garrow, B.

(l) *Phillips' case*, 3 Camp. 73. Cor. Lawrence, J. The medical men differed as to the time when the foetus may be stated to be quick, and to have a distinct existence; but they all agreed, that in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens usually about the 15th or 16th week after conception. Lawrence, J. said, that this was the construction to

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Variance.

Indictment for
maiming
cattle.

the prisoner with administering a decoction of savin (describing it to be a noxious substance) to a woman with child, but not quick with child, it was held to be unnecessary to prove that the substance so administered was savin, or that it was capable of procuring a miscarriage, or that the woman was with child, these being unnecessary averments (*m*).

Under indictments framed upon the stat. 9 Geo. I, c. 22 (*n*), for maiming or wounding cattle, it has been held that if it *appear* that the malice was against the *animal*, and not against the *owner*, the case is not within the statute (*o*). But it is not essential on the part of the prosecution to prove previously existing malice against the owner (*p*). The brutality of the act indicates a malignant mind, and the Jury are to judge of the real motives and intention of the prisoner.

Where the prisoner broke into a stable at night, and cut the sinews of the fore leg of a racer, in order to prevent his running, he was capitally convicted (*q*).

* 928

* MANOR.

Evidence essential to proof
of a manor.

EVERY manor consists of demesnes and services (*r*), and it is essential to the existence of a manor, not only that there should be two freeholders within the manor, but two

be put on the words of the statute; and as the woman in that case had not felt the child move within her before she took the medicine, he directed an acquittal.

(*m*) *Phillips'* case, 3 Camp. 73, per Lawrence, J.

(*n*) The word cattle in this statute includes horses, mares, and colts. *Paty's* case, 2 East's P. C. 1074. 2 Bl. R. 721. The statute applies, although the wound be not mortal, and does not occasion any permanent injury. *Haywood's* case, East's P. C. 1076.

(*o*) *Shepherd's* case, Cor. Hotham, B. and Heath, J. O. B. 1790. East's P. C. 1073, where it was left to the Jury to say whether a brutal injury to a horse resulted from sudden passion against the animal itself, or from motives of personal revenge against the master, and the prisoner was acquitted. See also *Pearce's* case, East's P. C. 1072. 1 Leach, 527. *Kean's* case, O. B. 1789. 1 Leach, 527.

(*p*) So held by the Judges in *Ranger's* case, Surry Summer Ass. 1798. East's P. C. 1074.

(*q*) *R. v. Dobbs*, 2 East's P. C. 513. So in *Dawson's* case, Russel, 1688, who was executed for poisoning a mare in order to prevent her from running a race, he having betted against her.

(*r*) Com. Dig. *Copyhold*, (Q. 1.) A manor commenced where the king granted lands with jurisdiction to another, who before the statute of *Quia Emptores* granted parcel of them to others to hold of him by certain services. Co. Litt. 58. ●●

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freeholders holding of the manor, and subject to escheats (*s*); and in default of freehold tenants the manor ceases to be a legal manor (*t*). But that which has been once a legal manor may still be a manor by reputation, and exist for the purpose of many prescriptive rights attached to it, although the right of holding courts for want of freehold tenants may have been severed from it (*u*).

Evidence essential to prove a manor.

Where the plaintiff alleged that he was seised of the manor of Froome Selwood, by virtue of which he claimed a prescriptive right to appoint a sexton, and it appeared in evidence that Froome Selwood had once been a legal manor, but had for some time ceased to be so for want of any freehold tenants, it was held that it might still be a manor by reputation, for the special purpose to satisfy the allegation (*x*).

* The question, whether a certain manor be of ancient demesne or not, is proved as all such tenures are, by an inspection of domesday by the Court (*y*). * 929

The existence of a manor is proved by the production of the ancient muniments of the manor, the court-rolls, the exercise of manerial rights (*z*), and by reputation (*a*). Reputation is also admissible evidence to prove the boundaries of a manor. And it seems that the description of the manor as such, in ancient deeds (*b*), or even mere oral reputation, without proof (*c*), of the actual exercise of any manerial rights, is evidence of a manor by reputation. Proof of the existence of a manor.

Upon a question, whether the lord of a manor was en-

(*s*) Per Ld. Kenyon, *Glover v. Lane*, 3 T. R. 447. *Bradshaw v. Lawson*, 4 T. R. 443.

(*t*) *Soane v. Ireland & others*, 10 East, 259. *Finch's case*, 6 Co. 63.

(*u*) Ibid. A manor by reputation is sufficient to entitle the lord to manerial wastes. *Curzon v. Lomax*, 5 Esp. C. 60. See *R. v. Bishop of Chester*, Skinn. 651. 1 Ld. Raym. 292. *Thinne v. Thinne*, 1 Lev. 87. Cary, 33, 4. 2 Brownl. 223. *Lenox v. Blackwell*, Skinn. 191.

(*x*) *Soane v. Ireland*, 10 East, 259. See also 2 Brownl. 223. Hil. 7 J. B. R. citing *Finch v. Durham*, where it was said to have been held, on issue joined on the plea of *non dimisit manerium* in ejectment, that upon a finding by the Jury that there were not any freeholders, but divers copyholders, and that it was known by the name of a manor, that it should pass to him who pleaded the demise of the manor. See also 12 Vin. Ab. T. b. 67.

(*y*) Hob. 188. B. N. P. 248. *Supra*, Vol. I. p. 167.

(*z*) *Supra*, tit. *Copyhold*, 421.

(*a*) *Supra*, Vol. I. p. 59. Vol. II. p. 421.

(*b*) *Curzon v. Lomax*, 5 Esp. C. 60.

(*c*) *Steele v. Prickett*, 2 Starkie's C. 466.

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Proof of the
existence of a
manor.

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Proof of man-
orial rights.

titled to the coals under a freehold tenement within the manor, it was held that he might give parol evidence to show that there was a known distinction within the manor between *old* and *new* land, and to show by evidence of reputation, as well as by acts of taking coal under the lands of other freeholders within the *new* land, that the lord was entitled to the coal within that boundary (*d*). And it was held that it was not necessary in such a case to prove the exercise of the lord's right in getting coal in the particular land then in question; it was sufficient to prove the exercise of the right, with respect to lands similarly circumstanced, and then reputation was evidence to show the generality and extent of the right (*e*). It was observed, * that the nature of the right rendered it probable that the exercise of it would be confined to the same spot until the subject-matter was exhausted, and therefore, that proof could not be expected of the exercise of the right in all places to which it might extend, for that would be proving a right to a thing which had ceased to be of any value (*f*). So, in general, what old people, deceased, have said concerning the boundaries of manors, is evidence, although what they have said as to particular facts and transactions is not admissible (*g*).

Usual reputation for sixty years past as to the contents of a manor, was held by Ld. Chancellor Egerton to be evidence to be left to a Jury, notwithstanding the production of ancient deeds, which showed that part of the lands claimed as parcel of the manor belonging to another manor (*h*). The evidence to prove the existence of a custom within a manor has already been considered (*i*).

Variance.

Where the plaintiff in ejectment claimed the manor of Artam as ancient demesne, and upon inspection of domesday it appeared that the manor of *Nettam* was of ancient demesne, the plaintiff was not allowed to prove that *Nettam* was the ancient name of the manor claimed, for the variance ought to have been averred on the record (*k*).

(*d*) *Barnes v. Mawson*, 1 M. & S. 77.

(*e*) Ibid. And see Ld. Ellenborough's observations in that case.

(*f*) Per Ld. Ellenborough, C. J. *Barnes v. Mawson*, 1 M. & S. 77.

(*g*) *Nicholls v. Parker*, Exeter Summer Ass. 1805. Cor. Le Blanc, J. 14 East, 331. n. *Supra*, Vol. I. p. 62. [*Smith v. Walker*, 1 Car. Law Repos. 514.]

(*h*) 12 Vin. Ab. T. h. 67.

(*i*) *Supra*, 418.

(*k*) B. N. P. 248, cites *Gregory v. Withers*, Hil. 28 Car. II. Qu. as to the description in the declaration in this case.

* MARRIAGE.

PART
IV.

THE spiritual court has the sole and exclusive cognizance of questioning and deciding directly the legality of marriage, and of enforcing specifically the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and so far as such rights are concerned they have the inherent power of deciding, incidentally, either upon the fact or legality of marriage. When they lie in the way to the decision of the proper objects of their jurisdiction they do not want or require the aid of the Spiritual Courts (*l*); nor has the law provided any legal means of sending to them for their opinion, except where an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, general bastardy. In those cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary; and his certificate, when received, returned, and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point (*m*).

Jurisdiction on questions of marriage.

The proof of a marriage, is either, 1st, of a marriage in fact; or 2ndly, of a marriage by evidence of repute, * co-habitation, &c.; or 3rdly, by evidence of a sentence or decree in the spiritual courts. * 932

1st. The usual proof of a marriage in fact before a Jury is by means of a witness who was present at the celebration. (1). Proof of a marriage in fact.

Where it has been celebrated in a parish church it does not appear to be necessary, in the *first instance*, to prove

(*l*) The answer to the claim of the Spiritual Courts to decide exclusively in such matters in the reign of Edw. II. was, *Quando eadem causa diversis rationibus coram iudicibus ecclesiasticis & secularibus ventilatur, dicunt quod non obstante ecclesiastico iudicio, curia Regis ipsum tractet negotium, ut sibi expedire videtur.* 2 Inst. 22. 11 St. Tr. 261.

(*m*) Per De Grey, C. J. in giving judgment in the *Dutchess of Kingston's* case. As the certificate of the ordinary is peremptory, the stat. 9 Hen. VI. requires public proclamation to be made, in order that parties who are interested may come in and be parties to the proceeding. *Vide supra*, tit. *Bastardy*; and Vol. I. p. 230.

(1) [See *Commonwealth v. Norcross*, 9 Mass. Rep. 492. *Commonwealth v. Littlejohn*, 15 ib. 163. *Ellis v. Ellis*, 11 ib. 92. *Inhabts. of Milford v. Inhabts. of Worcester*, 7 ib. 48, as to the evidence of a marriage required in Massachusetts, in different cases.]

PART
IV.

* 933

Marriage in
fact.

that the church was one in which marriages may lawfully be celebrated (*n*); so in general it is not essential to prove, in the first instance, that the officiating minister was a clerk in holy orders (*o*); or that * the banns had been duly published (*p*), or a license granted.

A marriage may also be proved by the production of the register, or proof of an examined copy of it (*q*).

It has been seen that although the entry be first made in a day-book, the day-book is not evidence, if the entry has been afterwards made in the register (*r*). It is not necessary to call one of the subscribing witnesses to the entry in the register (*s*).

In such case the identity of the parties must be proved (*t*)

(*n*) Previous to the marriage act, it was not essential that the marriage should be performed in a church or chapel, it might be celebrated in a private room. *R. v. Fielding*, 5 St. Tr. 614. *Jesson v. Collins*, 2 Salk. 437. 6 Mod. 155.

(*o*) Before the marriage act, 26 Geo. II. c. 33, s. 18, it was essential to the validity of a marriage that it should have been solemnized by a person in holy orders (*Haydon v. Gould*, 1 Salk. 119. 1 Bl. Comm. 439. *R. v. Luffington*, 1 Burr. S. C. 232); but a marriage celebrated by a Roman Catholic priest was binding; evidence of the ceremony being celebrated in England between the prisoner and a Roman Catholic woman, by a Romish priest, in a language which the witnesses did not understand, and which they cannot swear to, as the ceremony of marriage according to the church of Rome, is insufficient. *Lyon's case*, O. B. Dec. 1748, cor. Willes, L. C. J. East's P. C. 469. And see the observations of Ld. Ellenborough, *R. v. Brampton*, 10 East, 287.

In *Haydon v. Gould*, 1 Salk. 119, the parties were Sabbatarians, and the ceremony had been performed according to the rites of their sect, and they lived together for seven years, till the death of the wife, yet the officiating minister being a layman, the Ecclesiastical Court repealed the letters of administration granted to the husband, and the Court of Delegates, on appeal, confirmed the sentence. In *R. v. Fielding*, 5 St. Tr. 610, the marriage here by a Roman Catholic priest was held to be good, on evidence of the words of *present contract*, the rest being read in the Latin tongue, which the witness did not understand. And see *R. v. Brampton*, 10 East, 287, and *infra*, 938. And see the observations of Willes, L. C. J. in *Lyon's case*, East's P. C. 469.

(*p*) But it is competent to the adverse party to prove that the banns have not been regularly published. *Standen v. Standen*, Peake's C. 32. See Ld. Mansfield's observations, *St. Devereux v. Much Dewchurch*, 1 Bl. R. 367. 4 Burn's J. 280, 22d edit.

(*q*) *Supra*, Vol. I. p. 174, 5, 6.

(*r*) Vol. I. p. 175. *May v. May*, 2 Str. 1073. *Lee v. Meacock*, 5 Esp. C. 177.

(*s*) *Birt v. Barlow*, Doug. 170. *Supra*, Vol. I. p. 174; & *supra*, Part IV. p. 438. See further provisions as to registers, 52 Geo. III. c. 146.

(*t*) *Supra*, 439.

by evidence of their hand-writing, payment of money to the bell-ringers, the giving a wedding dinner, or any other circumstances which satisfy the jury (u).

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IV.

Where the marriage has been solemnized in a chapel, evidence should be given that banns have been usually published there previous to the marriage act (x); as by old registers of marriages solemnized in such chapels antecedently to the act, and registers of banns published there since, and to prove as far as can be done by living testimony, that marriages have been * usually celebrated there (y). * 934 Such evidence furnishes a reasonable presumption that the chapel is one in which marriages may legally be solemnized.

Chapel.

Although the marriage act requires an entry to be made in the register immediately after the celebration, in which it shall be expressed that the marriage was by banns or by license; and that if both, or either of the parties be under age, that it was with the consent of the parents or guardians, and that it shall be signed by the minister and parties, and attested by two witnesses, yet the registration of a marriage is but evidence of it, and is not essential to its validity (z).

The banns ought to be published in the true names of

Publication of
banns.

(u) B. N. P. 27.

(x) By sec. 1, all banns shall be published in the parish church, or in a public chapel in which banns have been usually published. By sec. 8; all marriages solemnized in any other place than a church or chapel, unless by special license, or without publication of banns, or license of marriage, from a person having authority to grant the same, shall be void. It has been held, that the words 'have usually been published,' refer to the time of the act, and consequently that marriages in a public chapel erected since the passing of the act are illegal, *R. v. Northfield*, Doug. 658. By different statutes, marriages celebrated in such subsequently erected churches, which have been duly consecrated, are rendered valid. See 21 G. 3. c. 53; 44 G. 3. c. 77; and the stat. 48 G. 3, c. 127, as to marriages solemnized before Aug. 23d, 1808. Provisions are also made by those statutes for the reception of the registers of those marriages in evidence, subject to the same exceptions as in the case of other marriage registers. By the stat. 48 G. 3, c. 127, such registers are to be removed within thirty days next after August 23d, 1808, to the parish church; or if the situation of the chapel be extra-parochial, to the parish church of the next adjoining parish, to be there kept with the marriage registers of the parish; copies are also to be transmitted to the bishop of the diocese, or his chancellor.

(y) See *Taunton v. Wyborn*, 2 Camp. 297.

(z) *R. v. St. Devereux*, 1 Bl. R. 367; *Read v. Passer*, Peake's C. 231; 1 Esp. C. 213.

PART
IV.Marriage in
fact.

* 935

the parties (*a*). But if they have been published in the names by which alone the parties are known, and without fraud, the marriage is good within the meaning of the statute. Abraham Langley resided for three * years in Lumberhurst, and during that time was known by the name of George Smith only, and the banns of his marriage were published, and he was married under that name, and the court of King's Bench held that the marriage was valid (*b*). And where a deserter assumed another name, and after residing for 16 weeks at L., where he was known by that name only, and then married there, the court held that the marriage was valid, the name having been assumed for the purpose of concealment, and not in order to impose upon the woman whom he married (*c*). But where there has been a changed of the name for the purpose of fraud, or (*d*) even a deliberate omission of part of a real name (*e*), with a view to mislead, it seems that the marriage will be void. So if

(*a*) For although the marriage does not specify in what manner the banns shall be published, yet it was the clear intention of the legislature to require it; and the statute requires that notice in writing shall be delivered to the minister, of the true christian and surnames of the parties, seven days before the publication.

A publication of banns in an adjoining parish church, where the publication in the proper parish church was impossible from the state of the church, which was under repair, held to be sufficient. *Stallwood v. Tredger*, 2 Phillim. 287.

(*b*) *R. v. Inhabitants of Billingham*, 3 M. & S. 250; and see *Frankland v. Nicholson*, there cited, where Sir W. Scott says, there may be cases where names acquired by general use and habit may be taken by repute, as the true christian and surnames of the parties.

(*c*) *R. v. Inhabitants of Burton-upon-Trent*, 3 M. & S. 537.

(*d*) See *Frankland v. Frankland*, 3 M. & S. 259. n; where Ann Nicholson, with a view to fraud, described herself to be Mrs. Ross, and was known by that name at the house where she lived; but it did not appear that she ever went by that name, down to the time of the marriage, for before that time she cohabited with the producent, under the name of Frankland, Sir W. Scott pronounced the marriage to be null and void. *Vide etiam*, *Fellowes v. Stewart*, 2 Phillim. 257; *Meddowcroft v. Gregory*, ib. 365; [2 Haggard, 207. S. C.] *Bayard v. Morpew*, 2 Phill. 321.

(*e*) *Pougett v. Tompkins*, [2 Haggard's Rep. 142. 1 Phillimore, 499. S. C.] 3 M. & S. 262, n. where William Peter Pougett, who was a minor, of the age of sixteen, and generally known and addressed by the name of *Peter* only, few people knowing that he had likewise the christian name of William, was married by banns to Letitia Tomkyns, his father's maid servant, in a parish where the parties had never resided, the banns were published in the names of *William Pougett*, and Letitia Tomkyns, and the marriage was pronounced to be null and void.

the banns be published in a wrong name, although without any fraudulent motive (f).

PART
IV.

* Where the marriage was by license, and either of the parties not being a widower or widow, was a minor, it is essential to prove the consent of the father of that party, if he was then living, or if he was dead, then of the guardians of the minor, or of one of them, or if there was no guardian, then of the mother, if living, and unmarried, and if there was no mother living and unmarried, then of a guardian of the person appointed by the court of chancery (g).

* 936

Marriage in
fact.
Minor.

In a prosecution for bigamy, where it appeared that the

(f) *Mather v. Neigh*, [cited 2 Haggard's Rep. 208, 254] Consistory Court, 1807, 3 M. & S. 265. n. where the real name of the woman was *Neigh*, and the banns were published under the name of *Wright*, and the marriage was held to be void. But where *Anna Colley* was married upon a publication of banns in the name of *Anna Sophia Colley*, it was said by Sir J. Scott, that in the absence of fraud the court would be very unwilling to question the validity of the marriage, after a long cohabitation by the parties. And see *Tres v. Quin*, [2 Phillimore, 14. S. C. 2 Haggard's Rep. 255. n.] 3 M. & S. 266. n; and *Mayhew v. Mayhew*, 3 M. & S. 266. n. [2 Phillimore, 11. S. C.] A publication in the name of *Edward Stanhope*, the real name being *Augustus Henry Edward Stanhope*, held to be bad, *Stanhope v. Baldwin*, 1 Addams, 93; see also *Green v. Dalton*, ib. 289. But where the banns were published, the woman being a natural daughter, in the name of the mother, as well as of the putative father, it was held to be sufficient. *Sullivan v. Sullivan*, ib. 45. [2 Haggard, 238. S. C.]

(g) 26 G. 2, c. 33, s. 11. An illegitimate child has been held to be within this clause, *R. v. Hodnett*, 1 T. R. 96; although it seems once to have been held that the consent of the putative father was sufficient, *R. v. Edmonton*, East. 24 G. 3. 2 Bott. 76. pl. 114, cited 1 T. R. 97. And the consent of the putative father or natural mother in such a case has been held to be insufficient, *Horner v. Liddiard*, [1 Hag. Rep. 337.] *Daniel v. Cooke*, Cor. Sir W. Scott; and *Priestley v. Hughes*, 11 East, 3, Grose, J. being of opinion that illegitimate children were not within the contemplation of the legislature in framing this clause. See also *Droney v. Archer*, 2 Phillim. 327. *Clarke v. Hankin*, ibid. 328, n. Where the parties have long cohabited, the court (ecclesiastical) will require the evidence of minority and want of consent, to be full and conclusive. *Johnston v. Parkes*, 3 Phillim. 49. *Hayes v. Watts*, Ibid. Where a testamentary appointment of a guardian was not attested by two witnesses, the marriage of a minor, with the consent of such guardian, held to be void. *Reddall v. Liddiard*, 3 Phillim. 256.

Consent is necessary, although the minor be a Jewess, married according to christian rites, *Jones v. Robinson*, 2 Phillim. 285. But the ecclesiastical court will not dissolve the marriage without satisfactory proof of minority, especially where the father's consent is rendered probable by circumstantial evidence. *Agg v. Davies*, 2 Phill. 341.

The license reciting the father's consent would be *prima facie* evidence of the fact. *R. v. Butler*, O. B. 1803.

PART
IV.Marriage in
fact.
Residence.

first wife was a minor at the time of the marriage, which was by license, the prisoner was acquitted for want of proof of the consent of a parent or guardian (*h*).

Whether the marriage has been solemnized upon a license granted, or the publication of banns, it is unnecessary after solemnization to give any evidence in support of the marriage that the parties resided within the limits, and for the times specified by the act, and evidence to the contrary is inadmissible (*i*).

* 937 The marriage act does not extend (*k*) to any of the marriages of any of the royal family (*k*), or to Scotland, * or to marriages amongst Quakers, or Jews (*l*) (1), &c. or to marriages beyond seas (*m*).

A marriage of English minors in Scotland is valid (*n*), although the marriage be contracted in direct contravention of the law of England, between parties repairing to Scotland for the purpose. (2).

A marriage by a dissenting minister in Ireland in a private room is valid (*o*).

A marriage may be avoided by evidence of the incapacity of either of the parties to contract, either by reason of a previous and still subsisting marriage with another, from

(*h*) Cor. Le Blanc, J. York Assizes. *Seem*, the license reciting the consent of the father or guardian would be *prima facie* evidence of the fact.

(*i*) By the marriage Act, sec. 10.

(*k*) Sec. 17.

(*l*) [*Jones v. Robinson*, 2 Phillimore, 285.] In the case of a Jewish marriage, it has been held at *Nisi Prius* to be insufficient to give evidence of the solemnization at the synagogue, without also proving the previous written contract of marriage. *Horn v. Noel*, 1 Camp. 61. In the case of *Ganer v. Lady Lansborough*, Peake's C. 17, a Jewess was allowed to give parol evidence of her own divorce in a foreign country. In the case of *Woolston v. Scott*, Norfolk Lent Assizes, 1753, Denison, J. in an action for crim. con. admitted the plaintiff, who was an anabaptist, to prove that the marriage was celebrated according to the anabaptists' form of religion, B. N. P. 28.

(*m*) Sec. 18.

(*n*) *Crompton v. Bearcroft*, Bull. N. P. 113; *Phillips v. Hunter*, 2 H. B. 412; 2 Burr. 1080; Co. Litt. by Harg. & Butler, note 79. b.

(*o*) *R. v.* — Old Bailey, January 1815. Cor. Sir J. Silvester.

(1) [On the subject of Jewish marriages, see the interesting cases of *Lindo v. Belisario*, 1 Haggard's Rep. 216, and *Goldsmid v. Bromer*, *ibid.* 324, and the papers, Nos. 1, 2, 3, and 4, in the Appendix to that volume.]

(2) [See *Supra*, 221, note (3). S. P.]

want of reason (3), for consent is absolutely requisite to matrimony (*p*); although formerly a lunatic was supposed to be able to contract matrimony (*q*).

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IV.

By 15 Geo. II. c. 30, all persons found lunatics under a commission of lunacy, or committed to the care of trustees, are declared incapable of marrying before they have been declared of sound mind by the chancellor, or by the majority of the trustees.

Marriage in
fact.

Marriages beyond the seas are excepted out of the * prohibition in the marriage act.—To be valid, they must be celebrated either as marriages were in England before that act, or according to the law of the country where the marriage takes place (*r*). And therefore it seems, that if the ceremony be not performed according to the laws of the country where such marriage is had, it must be solemnized by a person in holy orders (*s*), and not by a mere layman (*t*), and *per verba de presenti* (*u*).

* 938
Beyond seas.

(*p*) 1 Bl. Comm. 438. *Morrison's case*, Cor. Deleg. cited *ibid*. *Seem*, it is unnecessary to prove a decree of nullity in such a case. See Nolan, 200. [*Sed vide Wightman v. Wightman*, 4 Johns. Ch. Rep. 343.]

(*q*) By three judges, *Manby v. Scott*, 1 Lev. 4, 5. 1 Sid. 109. Bac. Abr. *Baron and Feme*, H. 1 Roll. Ab. 357.

(*r*) 1 Hale's P. C. 692, 3; 1 Haw. c. 43, s. 7; Roll. 79, 80. 1 Sid. 71; East's P. C. 465. 469; 3 Inst. 88.

(*s*) See the cases referred to in *R. v. Brampton*, 10 East, 287; it appeared that a soldier in the British army in St. Domingo, in 1796, went with the widow of another soldier to a chapel in the town, where they were to be married; the ceremony was performed there by a person appearing to be a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk, which the woman understood by means of an interpreter, at the time, to be the marriage service of the church of England. After this they cohabited as man and wife for eleven years, till the death of the husband. Upon a question as to the validity of this marriage in a settlement case, the court held that the facts warranted a presumption that the marriage had been legally contracted, since it appeared to have been contracted *per verba de presenti*, to have been celebrated by one who publicly assumed the habit

(*t*) *Haydon v. Gould*, 1 Salk. 119.

(*u*) Ld. C. J. Holt said, that a contract, *per verba de presenti*, was a marriage, viz. "I marry you—you and I are man and wife;" and that such a contract amounts to actual marriage, as if it had been in *facie ecclesie*. 6 Mod. 155; and see Dyer, 369. a. S. P.—(1).

(3) [See *Inhabitants of Middleborough v. Inhabitants of Rochester*, 12 Mass. Rep. 363. *Wightman v. Wightman*, 4 Johns. Ch. Rep. 343. *Turner v. Meyers*, 1 Haggard's Rep. 414. *Browning v. Reane*, 2 Phillemore, 69.]

(1) [By the canon law, which is the basis of the marriage law all

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IV.

Marriage in
fact.
Beyond seas.

* 939

Where the marriage is celebrated between English subjects in a foreign country, occupied by the troops of the King of England, it is to be presumed that the law of England, ecclesiastical and civil, was recognized and observed there (x).

In general, if it be insisted that the marriage has been solemnized in conformity with the law of the *country where the marriage took place, it is necessary to prove what the law of that country was (y).

Where the marriage appeared to have been solemnized by one who publicly assumed the office of a priest, and appeared to be such, and was performed openly in a public chapel, and was followed by a long cohabitation of the

habit of a priest, and appeared to be such, in a public chapel, and had been followed by cohabitation for eleven years.

A marriage between protestant British subjects, celebrated at Madras by a catholic priest, according to the rites of the Romish church, is valid, although no license be obtained from the governor, according to the local usage there. *Lantour v. Teesdale*, 8 Taunt. 880. Such a marriage would have been valid in England before the marriage act. *Ibid.* The canon law is the general law of marriage, unless it be altered by the municipal law of the particular place. *Ibid.* And therefore a marriage between British subjects, celebrated at Versailles by a protestant English clergyman there, but which is invalid according to the law of France, is invalid here. *Lacon v. Higgins*, 3 Starkie's C. 178. So a marriage by contract in Scotland, valid according to the law of Scotland, is valid here. *Dalrymple v. Dalrymple*, 2 Haggard's Rep. 54.

By the stat. 4 G. 4, c. 91, marriages celebrated by a minister of the church of England in the chapel or house of any British ambassador residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing within such factory, and those solemnized within the British lines by any chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be deemed to be good and valid.

(x) Per Ld. Ellenborough, *R. v. Brampton*, 10 East, 268.

(y) See tit. *Foreign Law*, and *supra*, 938, note (s).

over Europe, and by the law of Scotland, and of those States in the Union where there are no marriage acts to control it, consent alone to a contract of marriage, *de presenti*, is sufficient to render the marriage binding, without any other act. See *M'Adam v. Walker*, 1 Dow, 148. *Dalrymple v. Dalrymple*, 2 Haggard's Rep. 54. 81. *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. Rep. 48. *Inhabitants of Londonderry v. Inhabitants of Chester*, 2 New Hamp. Rep. 268. *Cheseldine v. Brewer*, 1 Har. & M'Hen. 152. *Fenton v. Reed*, 4 Johns. 22. See also *Benton v. Benton*, 1 Day, 111. *Hantz v. Sealy*, 6 Binney, 405. *Dumaresly v. Fishly*, 3 Marsh. 370.]

parties, it was held, in a settlement case, that a valid marriage was to be presumed (z).

PART
IV.

Evidence of the law of the country, with respect to marriages, must be derived from a person of competent knowledge on the subject (a). The Ld. Chief Baron of the Exchequer refused to receive evidence of the law of Scotland in regard to the validity of a marriage contracted there, from a tobacconist.

Marriage in
fact.
Beyond seas.

2dly. Cohabitation and repute, including the declaration of deceased members of a family, are, it has been seen, evidence not only as to the fact of marriage, but also as to the state and condition of the family, and the relationship of its various members (b). It seems to be a general rule, that in all civil, personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage (c) (1).

Cohabitation
and repute.

(z) *R. v. Brampton*, 10 East, 289. and *supra*, p. 936, note (s).

(a) Ibid. Vide *supra*, tit. *Foreign Laws*. In *Ganer v. Lady Lanesborough*, Peake's C. 17, a Jewess, was allowed by Ld. Kenyon to prove that she had been divorced in a foreign country, according to the custom and ceremonies of the Jews there.

(b) *Supra*, Vol. I. p. 58, 9. Vol. II. tit. *Bastardy*, p. 224; and *infra*, tit. *Pedigree*, where this subject, and also that of the competency of witnesses in such cases is further considered.

(c) Ibid. and *Leader v. Barry*, 1 Esp. C. 353. *Read v. Passer*, Peake's C. 231; *May v. May*, B. N. P. 112; *Hervey v. Hervey*, 2 W. Bl. 877; 2 Roll. Ab. 551; *Kay v. Duche's de Pienne*, 3 Camp. 123. See *Standen v. Standen*, cited 4 T. R. 469; and tit. *Presumption*, Vol. III. Where a marriage in Ireland was inferred from circumstances of avowal and reputation, the Ecclesiastical Court held that it was not invalidated by evidence of belief on the part of the husband that it was invalid, having been celebrated by a popish priest. *Steadman v. Powell*, 1 Addams, 58.

(1) [*Hammich v. Bronson*, 5 Day, 290. *Purcell v. Purcell*, 4 Hen. & Mun. 507. *Inhabts. of Newburyport v. Inhabts. of Boothbay*, 9 Mass. Rep. 414. *Tells v. Foster*, 1 Taylor, 121. *Whitehead v. Clinch*, 2 Hayw. 3. *Fenton v. Reed*, 4 Johns. 52. *acc.* But where, without any apparent rupture, the parties after a cohabitation of about two years, separated and continued separate nearly forty years, without any claims or pretensions on each other as husband and wife, the presumption of marriage arising from the previous cohabitation is rebutted. *Semb. Jackson v. Claw*, 18 Johns. 346 In cases of cohabitation, the presumption is in favor of its legality; but when it is known to have been illicit in its origin, this presumption cannot be made. *Cunninghams v. Cunninghams*, 2 Dow, 482. *Sed vide Fenton v. Reed*, and *Jackson v. Claw*, *ubi sup.*

In *Forney v. Hallacher*, 8 Serg. & Rawle, 159, the Sup. Ct. of Pennsylvania decided, that in an action for *crim. con.* the declaration of the defendant, that he knew the woman was married to the plaintiff, and that with knowledge of that fact, he had seduced her affec-

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IV.

* 940
Sentence of
Ecclesiastical
Court.

3dly. The effect of judgments in ecclesiastical courts upon the question of marriage has been already adverted to (b).

* In the case of civil proceedings, a direct sentence of nullity, or sentence in affirmance of a marriage, are, it has been held, conclusive evidence upon a question of legitimacy, arising incidentally upon a claim to a real estate (c).

A sentence in a jactitation suit, it has been held, is evidence as to a marriage, upon a question of title in ejectment, and in personal actions, founded upon a supposed marriage between the *same parties* or their privies (d).

So a direct sentence in a suit upon a promise of marriage against the contract, is evidence to disprove the contract in an action brought upon the same contract for damages (e). But in these cases it is to be observed, that the suits in which the evidence is so receivable must be between the same parties or their privates (f).

It seems that a sentence concerning marriage in a spiritual court is not evidence in a criminal proceeding, unless it be a direct proceeding in *rem*, and final and conclusive in its nature; and that even there it is liable to be impeached for fraud (g).

Bigamy.

* 941 It has been solemnly determined, in the case of the duchess of Kingston, that a sentence in a jactitation suit is not conclusive evidence upon a prosecution for * biga-

(b) *Supra*, Vol. I. pt. ii. sec. 78.

(c) 11 St. Tr. 261. *Supra*, Vol. I. p. 231.

(d) 11 St. Tr. 261. *Supra*, Vol. I. p. 233.

(e) Per De Grey, C. J. 11 St. Tr. 261. *Dacosta v. Villa Real*, 1 Stra. 691; *supra*, Vol. I. p. 216.

(f) *Supra*, Vol. I. p. 233. 11 St. Tr. 261. It is there said by Chief Justice de Grey, that in such cases the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed under those who were parties, and had acquiesced. *Qu. whether* such a sentence would be evidence for a stranger against a party, there being no mutuality. *Vide supra*, Vol. I. p. 186.

(g) *Vide supra*, tit. *Fraud*.

tions, &c. might be given in evidence in proof of the marriage. See *Ante*, p. 36. 438. note (x), & 439; 2 Phil. Ev. 151; where the same doctrine is suggested.

The weight of such evidence may be very small; its admissibility seems to rest on clear principles.]

my (*h*), but that at all events, it is liable to be impeached on the part of the crown by evidence of collusion (*i*).

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In the case of Martin Lolly (*k*), the prisoner being indicted for bigamy, his defence was, that previous to his second marriage he had been divorced from his first wife, whom he had married in England, by virtue of a sentence of the Consistorial Court in Scotland, in a suit instituted by the first wife, on the ground of adultery committed by the prisoner in Scotland; it appeared, that although the proceedings had been instituted *bona fide* by the wife, the whole had resulted from the artful practices and contrivance of the husband; the prisoner was convicted, and sentenced to transportation. The case was afterwards argued before the Judges, who are stated to have been unanimously of opinion that a marriage solemnized in England could not be dissolved but by an act of the Legislature (*l*).

Sentence of an
Ecclesiastical
court.

In an action for breach of promise of marriage, evidence of the promise is either, 1st, *express*, or 2dly, is from the nature of the case, frequently *presumptive*. It has been seen that the promise need not be in writing (*m*), and that where it is in writing it need not be stamped (*n*).

Action for
breach of pro-
mise of mar-
riage.

A promise to marry generally is in point of law a promise to marry within a reasonable time (*o*). Where the defendant, having called upon the plaintiff, to whom he paid his addresses, at her father's house, said * to the father, upon going away, I have pledged my honour to marry her in six months, or in a month after Christmas, and this varied from the counts, which alleged a promise to marry within a specified time; it was left to the Jury to presume from the circumstances, a general promise to marry (*p*).

* 942

The refusal to marry should also be proved, either by proof of an actual refusal, or of conduct and declarations equivalent to an absolute refusal; and where it is alleged

Proof of re-
fusal.

(*h*) 11 St. Tr. 262. *Supra*, tit. *Fraud*. It seems upon principle that such a sentence is not evidence at all. Vide Vol. I. p. 233.

(*i*) *Ibid*.

(*k*) Cor. Wood, B. Lancaster Sum. Ass. 1812.

(*l*) Russel, 287. See *Tovey v. Lindsay*, 1 Dow, 117; where this case is referred to by the Ld. Chancellor.

(*m*) *Supra*, 598. [See *Derby v. Phelps*, *Supra*, 602, note (1).]

(*n*) *Supra*, 79. *Orford v. Cole*, 2 Starkie's C. 351.

(*o*) *Potter v. Deboos*, 1 Starkie's C. 82.

(*p*) *Potter v. Deboos*, 1 Starkie's C. 82, Cor. Ld. Ellenborough.

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fence.

that the plaintiff has married another woman, the fact must be proved (*q*) (1).

A defence to an action of this kind frequently results from the very peculiar nature of the contract. It would be going much too far to say, that a party who is morally excused in breaking off an engagement to marry, is also in all cases legally absolved.

Nevertheless, the practising of fraud and deception in matters likely to influence the conduct of the other contracting party, would in this case, as well as in any other matter of contract, render the agreement void. It seems also, that where it is discovered that one party has been guilty of fraudulent or dishonest conduct in collateral transactions, the other party is not bound to fulfil a promise made previously to the discovery (*r*). But it would be incumbent on the defendant in such a case to substantiate the grounds of refusal by evidence. It would be insufficient to prove merely that a suspicion of the kind existed; and that upon being called upon to repel the charge, the plaintiff omitted to do so. But although the omission on

(*q*) As to the proof, *vide supra*, 932.

(*r*) See *Baddely v. Mortlock & ux.* Holt's C. 151. And in general, as to the principles on which a justification of this nature rests, see Pothier's *Traite du Contrat de Marriage*, Part II. c. 1. art. 7. *Qz.* whether a discovery of the woman's want of chastity be not a legal bar to an action by her.

(1) [In an action for breach of promise of marriage, an express promise need not be proved (6 Mod. 172. Holt, 458); a promise may be inferred from those circumstances which usually accompany such an engagement; such as expressions of attachment in letters, &c. *Wightman v. Coates*, 15 Mass. Rep. 1.

In *Peppinger v. Lowe*, 1 Halsted's Rep. 384, it was held that declarations of the plaintiff, that she had promised to marry the defendant, made long before the suit was brought, were good evidence for herself, to show the mutuality of the contract.

Evidence of seduction may be given in evidence to enhance the damages. *Semb.* Per Parsons, C. J. *Paul v. Frazier*, 3 Mass. Rep. 73. *Boynton v. Kellogg*, ib. 189. *Conn v. Wilson*, 2 Overton's Rep. 233. *Contra*, 2 Bibb, 341, *Burks v. Shain*.

If no time or place for the marriage is appointed, an offer to perform must be alleged and proved; allegation and proof of readiness and willingness are not sufficient. *Burks v. Shain*, *ubi sup.* See *Martin v. Patton*, 1 Littell's Rep. 235.

A promise of marriage, made to an infant by an adult, is binding on the latter, and the infant may maintain an action for the breach of it, without averring the consent of his parent or guardian to the marriage (*Connor v. Alsbury*, 1 Marsh. 78;) but if the infant be sued for breach of his promise, his infancy is a good defence. *Pool v. Pratt*, 1 Chip. Rep. 252.]

the part of the plaintiff to exculpate himself would be no bar to the action, it may * nevertheless under the circumstances materially affect the damages (s). It seems that in general where one party has improvidently made a promise to marry another, the gross misconduct and general bad character of the plaintiff is a good defence to the action (t).

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* 943
Proof in defence.

So if a man after a promise of marriage has been made by the woman, conduct himself in a brutal or violent manner, and threaten to use her ill, she is not bound to commit her happiness to his keeping, and this would be a legal defence to the action (u). And even in cases where the misconduct of the plaintiff does not afford a legal bar to the action, yet if he has betrayed gross habits or want of feeling, such circumstances ought it seems to be considered by a Jury in their estimate of damages (x).

MURDER.

THE offence consists in the killing any person under the king's peace, with malice aforethought, either express or implied (y).

This definition includes, 1st, The killing of another; 2dly, Of malice; 3dly, By the prisoner's act.

1. The proof of killing another involves the proof of * the death of the person, and that it was occasioned by * 944 some act done by another.

First, Of the death of the person specified in the indictment. It has been laid down by Ld. Hale, as a rule of prudence in cases of murder, that to warrant a conviction, proof should be given of the death, by evidence of the ac-

Proof of the death.

(s) Ibid.

(t) *Foulkes v. Sellway*, 3 Esp. C. 236. [*Supra*, 369, note (2).] In that case the defendant had a verdict; but note, that he proved not only that the plaintiff was a woman of general bad character, but also one instance of gross misconduct. In the same case Ld. Kenyon held, that a witness might give evidence as to the character which he had heard of the woman upon inquiry in the neighbourhood, although it was objected that those who knew her character in the neighbourhood ought to be called, and give evidence, since otherwise the party would be precluded from cross-examining as to the means of knowledge. *Tam. qu.*

(u) Per Ld. Ellenborough, in *Leeds v. Cook & ux.* 4 Esp. C. 256.

(x) Ibid.

(y) Fost. 256. 4 Bl. Comm. 198. 3 Inst. 47. 1 Hale, 424.

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Proof of death.

tual finding of the body (*b*). But although it be certain that no conviction ought to take place unless there be most full and decisive evidence as to the death; yet it seems that actual proof of the finding and identifying of the body is not absolutely essential. And it is evident that to lay down a strict rule to that extent might be productive of the most horrible consequences.

In *Hindmarsh's* case (*c*) the prisoner, a mariner, was indicted for the murder of his captain at sea, a witness saw the prisoner throw the captain overboard, and he was not seen or heard of afterwards; and it was left to the Jury, under the circumstances, to say whether the deceased had not * 945 been killed by the prisoner before * he was thrown into the sea, and the jury being of that opinion, the prisoner was convicted and executed. (*d*.)

A variance in the proof in the name of the deceased, as alleged in the indictment, will be fatal (*e*).

Next, the act (*f*) of the prisoner which occasioned the

(*b*) 2 Hale, 290; where *Ld. Hale* said, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, for the sake of two cases; one mentioned in my *Ld. Coke's P. C.* 104, p. 232, a *Warwickshire* case (*vide supra*, Vol. I. p. 33); another that happened within my remembrance in *Staffordshire*, where *A.* was long missing, and upon strong presumptions, *B.* was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon *B.* was indicted of murder, and convicted and executed; and within one year after, *A.* returned, being indeed sent beyond sea by *B.* against his will; and so, though *B.* justly deserved death, he was really not guilty of that offence for which he suffered."

I recollect to have read a very remarkable account of the case of *Ambrose Gwynnett*, who, after being convicted of murder, was suspended for a considerable time in the usual course of execution, and afterwards gibbeted, and yet, in consequence of a series of singular circumstances, he survived his supposed execution, and having escaped to a foreign country, actually met and conversed with the person for the supposed murder of whom he had been condemned to die.

(*c*) 2 Leach, 571.

(*d*) The conviction was unanimously approved of by the judges. The objection, that the body had not been found, was urged by *Mr. Garrow* at the trial. See a case cited *Russel*, 683; where *Gould, J.* directed the acquittal of two prisoners who had been seen to strip an infant, the bastard child of one of them, and throw it into a dock at *Liverpool*, on account of the possibility that the tide might have carried out the living infant from the dock.

(*e*) See *Starkie's Criminal Pleadings*, 184, 2d edit.

(*f*) It is necessary that the death should have been occasioned by some corporeal injury done to the party by force, or by poison, or by some other *mechanical means* which occasion death; for although a person may in *foro conscientiae* be as guilty of murder by

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death is to be proved. The proof must agree in substance with the allegations on the record. But if the act of the prisoner, and the means of death proved, agree in substance with those which are alleged, the nature of the violence, and the kind of death occasioned by it being the same, a mere variance as to the name, or kind of instrument used, will not be material (*g*). * Neither will the variance be material, though it should appear that the party charged as a principal in the second degree was a principal in the first degree; or, although it should turn out that a party indicted as a principal in the first degree, was but a principal in the second degree (*h*).

Proof of the
cause of the
death.

* 946

Unless the death be so immediately and obviously occasioned by the violence inflicted by the prisoner, as to exclude all doubt upon the subject, the connection between the act of the prisoner and the death of the deceased must be proved by means of the judgment of persons of professional skill and experience, who have had an opportunity of forming an opinion upon the subject, or who are enabled to form an opinion from the circumstances of the case, as detailed by others (*i*).

Connection between the act
and the death.

Where there is any doubt whether the death was occasioned by the act of the prisoner, or by some other cause, it is of course a question of fact for the jury (*k*).

working on the passions or fears of another, and as certainly occasion death by such means as if he had used a sword or pistol for the purpose, he is not the object of temporal punishment (1 Hale, 427. 429. East's P. C. 225). But it is not essential that the hand of the party should immediately occasion the death; it is sufficient if he be proved to have used any mechanical means likely to occasion death, and which do ultimately occasion it: as, if a man lay poison for another, with intent that he should take it by mistake for medicine, or expose another, against his will, in a severe season, by means of which he dies (1 Haw. c. 31, s. 5. 1 Hale, 431, 2); so where a harlot left her newly-born child in an orchard, covered only with leaves, where it was killed by a kite (1 Hale, 431. East's P. C. 226); so where a pauper is wilfully removed from parish to parish till he die for want of care and sustenance (Palm. 545); or an apprentice dies from negligence and harsh usage. *Self's* case, East's P. C. 226, 7.

(*g*) See the cases, Stark. Crim. Pl. 91. 2d. edit. It seems that proof of any one of the means of death stated is sufficient, *ib.* and *R. v. Clark*, 1 B. & B. 473. 1 Bulst. 87. *Weston's* case, 3 Inst. 49. *Watkin's* case, 4 Co. 41.

(*h*) See Stark. Crim. Pleadings, & *supra*, tit. *Accessory*.

(*i*) *Vide* Vol. I. p. 74; and *Squire's* case, Stafford Lent Assiz. 1799, Cor. Lawrence, J. Russel, 621.

(*k*) *Self's* case, East's P. C. 226, 7; where an apprentice having returned from Bridewell, whither he had been sent for misbeha-

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cause of the
death.

* 947

Where the husband and wife were charged with the murder of an apprentice to the husband, by using him in a barbarous manner, and not providing sufficient nourishment, and the opinion of the surgeon who opened the body, was, that the boy died from debility, * occasioned by the want of proper nourishment, and not from the wounds, &c. it was held that the wife was entitled to be acquitted, as it was the duty of the husband and not of the wife to provide sufficient food and nourishment for the apprentice (l).

It is sufficient in law to prove that the death of the party was *accelerated* by the malicious act of the prisoner (m), although the former laboured under a mortal disease at the time of the act. And it is sufficient to constitute murder that the party dies *of the wound* given by the prisoner, although the wound was not *originally mortal*, but became so in consequence of negligence or unskilful treatment (n); but it is otherwise where the death arises, *not from the wound*, but from unskilful applications or operations used for the purpose of curing it (o).

Proof of malice.

II. Malice is either positive and *express*, or it is *implied* malice, or malice in construction of law. Malice of the former kind consists in an actual and deliberate intention unlawfully to take away the life of another (p); and the actual existence of such an intention is a question of fact to be found and ascertained by the jury. Implied or constructive malice is not a fact for the jury, but is an inference or conclusion founded upon the particular facts and circumstances ascertained by them, in which case the real intention and object of the prisoner is frequently a very material * ingredient, although he did not deliberately meditate and intend actual destruction.

* 948

viour, in a lousy and distempered state, and was afterwards ill-treated by his master, and medical evidence was given, that if he had been properly treated after his return home he might have recovered, it was left to the jury to say whether the death had been occasioned by ill treatment which the apprentice received from his master after returning from Bridewell.

(l) *R. v. Squire & ux. Russel*, 621.

(m) 1 Hale, 428.

(n) Ibid.

(o) Ibid.

(p) *Supra*, tit. *Malice*. Malice being essential to the offence, it follows that no person can incur the penalties of homicide who is of so imbecile or unsound a mind as to be incapable of malice, according to the rule of civil law, *ut nec infans, nec furiosus, nec qui casu fortuito occidit, hac lege teneatur*. L. 12, h. t. L. 3. § 4. Heinec. Elem. Jur. Civ. ad Pand. P. 7, sec. 201. *Vide supra*, tit. *Infant*, 728; *infra*, tit. *Will*.

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It is a general rule, that the law infers malice from the very fact of killing (*q*); and that all the circumstances of necessity, accident or infirmity, which justify, excuse, or extenuate the act, are to be proved by the prisoner, unless they arise out of the evidence produced against him (1). It is for the jury to pronounce upon the truth of such facts; and it is for the court to decide whether in point of law the fact of killing is justified, excused, or alleviated by those facts (*r*).

Proof of malice.

Upon an indictment for murder, whenever the question turns upon the *actual* and *specific* intention of the prisoner at the time of the act which occasioned the death, the existence of that intention or disposition is a question of fact for the decision of the jury under all the circumstances of the case. And it seems that in general, notwithstanding any facts which tend to excuse or alleviate the act of the prisoner, if it be proved that he was in fact actuated by premeditation and deliberate malice, and that the particular occasion and circumstances upon which he relies were sought for and taken advantage of, merely with a view to gratify actual malice, in pursuance of a preconceived scheme of destruction, the offence will amount to murder (*s*).

Actual intent to destroy.

Where, however, *fresh provocation* intervenes between the preconceived malice and the death, it will not be presumed that the killing was upon the antecedent malice.

If *A.* and *B.* quarrel, and they are reconciled, and afterwards fall out again, and *A.* kill *B.* it will not be presumed that the parties fought upon the old *grudge (*t*). But if proof be given that the reconciliation was but counterfeit, and that the prisoner was actuated by the previously conceived malice, it will be murder (*u*). * 949

The materials from which the jury are to draw their conclusion as to such an intention are obviously the previous situation of the parties, the connection and transactions

(*q*) Fost. 255.

(*r*) Ibid. 2 Ld. Raym. 1493. 2 Str. 771.

(*s*) East's P. C. 224. 1 Hale, 451.

(*t*) 1 Hale, 451. *Infra*, 964. *Mason's case*, note (*o*).

(*u*) Ibid. And see *Maure's case*, Fost. 132. East's P. C. 239.

(1) [*Pennsylvania v. Honeyman*, Addison's Rep. 148. *Same v. Bell*, *ibid.* 161. *Same v. M'Fall*, *ibid.* 257. *Same v. Lewis & al.* *ibid.* 282. *The State v. Zellers*, 2 Halsted's Rep. 220. *Acc.* But since the statute of 1794, in Pennsylvania, the burden of proof is on the Commonwealth; unless the circumstances of malice are proved, it is murder only of the second degree. *Commonwealth v. O'Hara*, before M'Kean, C. J. Wharton's Digest, 148.]

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Actual inten-
tion to destroy.

between them, the conduct and expressions of the prisoner towards the deceased, the motives by which he was probably influenced, and above all the facts and circumstances immediately connected with the transaction, particularly the means of destruction used, the mode in which they were procured, and the subsequent conduct and demeanour of the prisoner.

Intention to
injure, &c.

Where malice is an inference of law from the facts, that is, as it seems in all cases where the act does not result from actual and preconceived malice, the question still frequently depends upon the actual intention of the prisoner, which is to be found as a fact by the jury. They are to find the nature, extent, and origin of the intention, as, whether the prisoner really intended not to destroy the deceased, but to do him some bodily injury, and to what extent, and whether this intention was preconceived, or arose upon the occasion of some sudden provocation given (x).

Negligence.

* 950

Where there was no intention either to kill or injure, it seems also to be a question of fact for the jury, whether the prisoner conducted himself carelessly and negligently, and whether he might not, by using proper * precaution, have prevented the death. According to the opinion of Sir Michael Foster, the law does not require the *utmost* caution to be used; it is sufficient that a *reasonable* precaution, what is usual and ordinary in like cases, be taken (y), and this appears to be a question of fact for the jury (z) (1).

(x) If *A.* intendeth to beat *B.* in anger, or from preconceived malice, and death ensueth, it will doubtless be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for the consequences of doing it. Fost. 259.

(y) Fost. 264, 5.

(z) Ibid. and the case there cited; where it was left by Mr. J. Foster as a question for the jury, to say whether the prisoner, on a charge of manslaughter, had not reasonable grounds for believing that a gun which went off accidentally in his hands, was not loaded.

(1) [If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient. *Commonwealth v. Thompson*, 6 Mass. Rep. 134.]

By *constructive* malice, or malice in law, it is meant that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit (*a*), and carry with them the plain indications of a heart regardless of social duty, and fatally bent upon mischief (*b*). Here the law itself infers malice from the circumstances found by the jury, without their special finding of an actual intention to destroy the deceased.

Constructive
malice.

It would be manifestly inconsistent with the design of this work to enter into a discussion of those circumstances and particulars which constitute constructive malice, or malice in law. In point of practice, it is usual and proper to be prepared with evidence of all the circumstances connected with the transaction which tend to explain its real nature. In particular, it is essential to show what the real intention and object of the prisoner was, although it fell short of a deliberate design to take away the life of the deceased; that his intention was to commit some other felony, or a trespass, or some other unlawful act, or that the death resulted from carelessness and culpable want of caution; the nature and circumstances of the quarrel, * and * 951 provocation, where such have existed; the nature of the weapon used, and the mode of procuring it.

Where the defence is, that the death was occasioned by *accident*, the nature of the act itself which occasioned the death, and the real motive and intention of the prisoner, are the proper subjects of evidence; but the conclusion as to the quality of the offence, as founded upon such facts, is usually a question of law. If the act was done in the prosecution of a felonious intention, it will amount to murder (*c*). But it is not murder, but manslaughter, if the prisoner intended to commit a mere trespass when he accidentally killed the deceased (*d*).

Malice in case
of killing by
accident.

(*a*) Fost. 256.

(*b*) Ibid. 257. [*U. States v. Cornell*, 2 Mason's Rep. 91. *U. States v. Ross*, 1 Gallison, 628.]

(*c*) Fost. 258. If *A.* shoot at the poultry of *B.* and accidentally kill a man, if he intended to steal them, it is murder; but if he intended merely to kill them, it is but manslaughter; and it is not even manslaughter if the wrongful act be merely *malum prohibitum*; as, where an unqualified person uses a gun to kill game. Fost. 259. See the next note.

(*d*) Foster, 258. *Ld. Coke* seems to have doubted whether, even in the latter case, the offence would not amount to murder; but *Mr. J. Foster* was of opinion that it would amount to no more than manslaughter; and even in the former case the rule of law is exceedingly ambiguous and unsatisfactory, as every rule must be which is not founded upon the degree of moral guilt, or upon

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* 952
Construction.
Malice in case
of killing by
accident.

So malice may be inferred where an act unlawful in itself is done deliberately, and with intention of mischief, or great bodily harm to those on whom it may * chance to light, and death is occasioned by it (*e*). And although such an original intention should not appear, but such unlawful act be done heedlessly and incautiously, the offence will amount to manslaughter (*f*).

If *A.* intend to beat *B.* in anger, or from preconceived malice, and death ensues, he is guilty of murder, or of manslaughter at the least, although he did not intend the death (*g*); for what he did was *malum in se*, and he is answerable for the circumstances; but the nature of the offence in such cases must depend upon the particular circumstances.

If there was an *actual intention* to kill, or to do great bodily harm, the offence would undoubtedly be murder, without regard to the *means* used; but if there was a mere intention, as evidenced by the act itself, to do some bodily injury, the complexion of the defence will depend upon the nature of the instrument, and the manner and circumstances of using it, and the offence will be murder or manslaughter accordingly as these facts do or do not indicate that brutal or malignant intention which constitutes malice in law (*h*).

The inference of malice frequently arises from the means used by the prisoner, as, where he has used such an instrument as was likely to produce fatal consequences, and where, if he had used one of a different nature, and *not likely to occasion death*, the offence, on account of the provocation previously given, or other circumstances, would have amounted to manslaughter only. Thus, if a master
* 953 or parent, in the correction of * a child, exceed the bounds

grounds of public convenience or necessity. Upon what ground can it be reasonably contended that a man ought to suffer death because he has from pure accident killed another, whilst he was committing an act for which he probably would not have been imprisoned for six months? The immorality of his act is not increased by a circumstance wholly unforeseen and unexpected, and the mere possibility that death may be occasioned in the course of committing a larceny, and that the punishment when such an accident does happen, may be capital, is not likely to operate in the least degree to diminish the number of offenders.

(*e*) Fost. 261.

(*f*) Ibid.

(*g*) Ibid. 259. 1 Hale, 440, 1. Kel. 127.

(*h*) See East's P. C. 257. Kel. 127. If one throw a large stone at another with a deliberate intention to hurt, but not to kill, it will be murder. 1 Hale, 440, 1.

of moderation, either in the *measure* of it, or in the *instrument* made use of, it will be murder or manslaughter according to the circumstances of the case (*h*).

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And even in the case of homicide by a person following his lawful occupation, any degree of carelessness and negligence, through which the death was occasioned, will constitute him guilty of manslaughter, and he must show in defence that he used all due caution (*i*). If the driver of a cart had notice of the mischief likely to ensue, and yet drove on, he is guilty of murder; if he might have seen the danger, but did not look before him, he is guilty of manslaughter, for there was a want of due circumspection; but if the accident happened in such a way that *no want of due care* can be imputed to the driver, it will be but accidental death (*k*). And in general it is not sufficient that the act from which death resulted was lawful or innocent; it must be done in a proper manner, and with due caution, to prevent mischief (*l*).

Malice.
Negligence in
doing lawful
occupation.

Although it is, as has been seen, a general rule, that circumstances in justification, excuse, or alleviation, are to be proved by the prisoner, yet where the inference or implication of law, as to malice, results from the legal authority and situation of the deceased, that authority *must be proved, or in default of proof the offence will in general amount to no more than manslaughter.

Proof where
the inference of
malice results
from legal situation of parties.
* 954

In general, ministers of justice are specially protected by the law whilst they act in the execution of their duty, and the killing of officers so employed is deemed to be murder, because it is an outrage wilfully committed in defiance of the justice of the kingdom (*m*); such an officer is protected *eundo, morando, et redeundo* (*n*), and so is every

Officers of
justice.

(*h*) Fost. 262. Hale, 474. [*U. States v. Cornell*, 2 Mason's Rep. 91.]

(*i*) Fost. 262. *Supra*, 950.

(*k*) Kel. 40.

(*l*) Fost. 262. Dyer, 128. 9 St. Tr. 112. *R. v. Rampton*, O. B. 1664. See the case, Kel. 41, and Fost. 263. A man found a pistol in the street, which he had reason to believe was not loaded, he having tried it with the rammer; he carried it home, and showed it to his wife, and she standing before him, he pulled up the cock and touched the trigger, the pistol went off, and killed the woman. This was ruled to be manslaughter. Mr. J. Foster, with great reason, as it seems, expressed his disapprobation of this case; and adds, that admitting the judgment to be strictly legal, it was, to say no better of it, *summum jus*.

(*m*) Fost. 208. 370. 1 Hale, 457.

(*n*) Fost. 309.

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IV.Malice im-
plied.
Officers of
justice.

man who acts in his aid, whether he be commanded to assist or not (*o*). In general, if one having *lawful authority* to arrest in either a civil or criminal proceeding, and using *lawful means*, be resisted and killed, it will be murder in all who made or aided in the resistance (*p*).

Those who have *lawful authority*, are either, 1st. public officers; or, 2dly, private persons.

A public officer acts either, 1st, under a warrant, or 2dly, without one.

Warrant.

By legal process, whether by writ or warrant, is meant a process which is not defective in the framing of it; for if the writ or warrant be legal, although the previous proceedings were irregular, it will be murder to kill the officer, for he was bound to obey it; and therefore it is sufficient in evidence to prove the writ or warrant, without * 955 showing the decree or judgment upon * which it is founded (*q*). But it is not sufficient to prove the sheriff's warrant to the officer without producing the writ of *capias*, &c. on which it is founded (*r*).

But if the process be defective in the frame of it, or if there be any mistake in the name or addition of the person upon whom it is to be executed, or if the name of the person or officer by whom it is to be executed be inserted without authority, and after the issuing of the process (*s*), or it be otherwise altered after it has been issued, or if the officer exceed the limits of his authority, and be killed, it is no more than manslaughter in the person whose liberty is

(*o*) Ibid. 1 Hale, 463. If a man be lawfully arrested, and he and his party resist, and a stranger to the facts interposes, the question seems to turn principally on his *intention*; for if he interposes with intent to aid the one party against the other, he does it at his peril, and is guilty of implied malice, if he lend aid to the party lawfully arrested, and the officer be killed (*Sir C. Stanley's case*, Kel. 87); but if he merely interpose, being ignorant of the facts, with intent to preserve the peace, he certainly would not be guilty of murder. East's P. C. 296. 1 Sid. 160. See the *Sittinghurst-house case*, 1 Hale, 461, 2, 3.

(*p*) Fost. 270. 308.

(*q*) Fost. 311, 312. *R. v. Rogers*, East's P. C. 310. As to proof of a writ, see Vol. I. p. 285.

(*r*) 2 Starkie's C. 205.

(*s*) An arrest upon a warrant in which the officer's name is inserted, after it has been signed and sealed by the sheriff, is illegal; *Housin v. Barrow*, 6 T. R. 122.—*R. v. Stockley*, East's P. C. 310. [See 3 Moore, 246.] But where a magistrate keeps a number of blank warrants ready signed, and on being applied to fills them up, the officer may legally execute the warrant, and consequently it will be murder to kill him. *R. v. Inhab. of Winwick*, 8 T. R. 455.

so invaded (*t*). So it is if the court from which the process issued wanted jurisdiction (*u*).

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IV.

Without a warrant.—A peace-officer may justify an arrest on a charge of felony, on reasonable suspicion, without a warrant, although it turn out that no felony has in fact been committed; for all that a constable can do is to inform himself of the circumstances, and it is the duty of all persons to submit to the known officers of the law (*x*).

Malice implied.
Arrest without a warrant.

A private person, it seems, is a trespasser (*y*), unless * a felony has in fact been committed; and where a felony has been committed, and *A.* suspecting *B.* to be guilty, who is in fact innocent, attempts to arrest him, *A.* is not within the protection of the law, and the killing would amount to manslaughter only (*z*) (1); but if a felony has been committed, or a dangerous wound has been inflicted, and the party flies, it is the duty of every one to prevent an escape (*a*).

* 956
By a private person.

Either a constable or private person may lawfully interpose, on his own view, to prevent a breach of the peace, or quiet an affray (*b*); but in the case of the constable, a notification of the character in which he interposes may, it seems, be implied from his office (*c*); but a private person must give express notice (*d*).

Notice.

(*t*) Fost. 312. [*Commonwealth v. Drew & al.* 4 Mass. Rep. 391.]

(*u*) East's P. C. 309. MS. Summ. 163.

(*x*) *Samuel v. Payne*, Dougl. 359, and *vid. supra*, 819.

(*y*) 2 Hale, 83. 92. East's P. C. 301. *Qu.* whether the finding of a bill by a grand jury be such *prima facie* evidence of a felony as to warrant the apprehension of the party by a private person. East's P. C. 301.

(*z*) Fost. 318; where Mr. J. Foster says, "This suspicion, though probably well founded, will not bring the party attempting to arrest or imprison within the protection of the law so far as to excuse him from the guilt of manslaughter if he killeth; or, on the other hand, to make the killing amount to murder. I think it would be felonious homicide, but not murder, in either case, the one not having used due diligence to be apprized of the truth of the fact, and the other not having submitted or rendered himself to justice; yet in such a case *A.* might justify the imprisonment of *B.*" 1 Hale, 490. *Supra*, 823.

(*a*) Fost. 271. 309. East's P. C. 298. *Jackson's case*, 1 Hale, 464. 481. 489.

(*b*) Fost. 310. 1 Hale, 463. 1 Haw. c. 31, s. 44.

(*c*) *Ibid.*

(*d*) Fost. 272. 311.

(1) A well grounded belief that a felony is about to be committed will extenuate a homicide committed in prevention of the felony, but not a homicide committed in pursuit, by an individual of his own accord. *The State v. Rutherford*, 1 Hawks, 457.]

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plied.
Arrest.

* 957

Proof of au-
thority.Notification
of authority.

And it seems that a peace-officer has no authority to arrest after the fray is over, and peace has been restored (e), except for the purpose of taking an offender before a magistrate to find sureties (f).

No private person can justify an arrest in a civil suit (g).

* The fact that the party killed was an officer of justice, such as a constable, or other peace-officer, may be proved generally by evidence that he acted in that capacity, without strict evidence of his appointment (h). It has been seen, that although a special authority to arrest under a precept be alleged in the indictment, if a legal authority to arrest, but not under the precept, be proved, the variance will not be material (i).

Where the deceased was killed in the execution of some authority derived from the articles of war, a copy of them, printed by the king's printer, ought to be produced (k). In several instances prisoners have been acquitted of the charge of murder for want of such evidence.

Using *lawful means*.—There must in all cases be a notification of the character and object of the party. Where a bailiff rushed abruptly into the bedchamber of a gentleman (l), not telling his business, nor using words of arrest, and the gentleman, not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber and stabbed him, it was held to be but manslaughter at common law, &c.

So where a peace-officer interposes to suppress a riot; for otherwise the parties engaged in the heat and bustle may imagine that the officer takes a part in the riot (m). But a small notification in the case of a peace officer is sufficient; as, if he command peace, or in any other way declare with what intent he interposes (n). If he announce his business, it is not necessary that he should produce his

(e) 2 Inst. 52. 2 Ld. Raym. 1491. Dalt. c. 1, s. 7.

(f) 2 Hale, 90. If a felony be threatened, the party may be arrested.

(g) 1 Haw. c. 28, s. 19.

(h) *Supra*, 372.

(i) *Supra*, 347. *Mackally's case*, 9 Co. 62. East's P. C. 345.

(k) *Supra*, Vol. I. p. 165.

(l) 1 Hale, 470. Fost. 298. See also the cases cited *supra*, 956.

(m) Fost. 310, 311. East's P. C. 314.

(n) Fost. 310. 1 Hale, 460, 1. *Gordon's case*, Leach's C. C. L. 337.

warrant, unless it be * demanded (*o*) ; and he is in no case bound to part with the warrant out of his possession (*p*).

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An officer cannot, in the execution of civil process, justify the breaking open an outward door or window (*q*), for in the language of the books, every man's house is his castle, for safety and repose to himself and his family ; but if the officer enter by an open door, he may then lawfully remove every obstruction to the execution of his duty (*r*).

Malice implied.
Proof of lawful execution of authority.

The rule is confined to the protection of the owner and his family who are domiciled there ; if a stranger take refuge there, it is not his castle, and he cannot claim the benefit of sanctuary within it (*s*).

The rule is also confined to the case of arrests in the first instance ; for if a man be legally arrested, and then escape and take shelter in his own house, the officer may, on fresh suit, break open doors to retake him, having first given due notice of his business, and demanded admission, which has been refused (*t*) (1).

It is also confined to civil cases ; for in case of a felony committed, or dangerous wound given, or even where a minister of justice is armed with a warrant, in case of a breach of the peace, an outer door may be forced (*u*). But in no case can an outer door be legally broken unless a previous notification and demand have been made, and a refusal given (*x*).

III. *By the prisoner*.—Where the death has been occasioned in secrecy, a very important preliminary question By the prisoner.

(*o*) 1 Hale, 458. 583. 9 Co. 60.

(*p*) East's P. C. 319.

(*q*) Fost. 319. 2 Roll. Rep. 137. Palm. 52. Cro. Jac. 555. 1 Hale, 458. *Lee v. Gansell*, Cowp. 1.

(*r*) *Lee v. Gansell*, Cowp. 1.

(*s*) 5 Co. 93. 2 Hale, 117. Fost. 320.

(*t*) Fost. 320. 1 Salk. 79. 6 Mod. 173. Ld. Raym. 1028. 7 Mod. 8. 2 Roll. Rep. 138. 1 Hale, 459. Laying hold of the prisoner, and pronouncing words of an arrest, is an arrest. Fost. 320.

(*u*) Fost. 320. *Curtis's case*, ib. 135. *Supra*, 814. [*Bell v. Clapp & al.* 10 Johns. 263.]

(*x*) Ibid. [See *Yelv.* 29. *a*, note (1).]

(1) [Bail may depute another to take and surrender their principal ; and the bail, or the person deputed by him for that purpose, may take the principal in another State, or at any time and in any place, and may, after demand of admittance and refusal, break open the door of the principal's house, in order to take him. *Nicolls v. Ingersoll*, 7 Johns. 146. See also 5 Esp. C. 172, (*Day's ed.*) note. 2 H. B. 120.]

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Proof of the
prisoner's
agency.

* arises, whether it has not resulted from accident, or the act of the party himself, who was *felo de se*.

It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, in order to save his memory from dishonour, and to preserve his property from forfeiture. Instances have also occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy, by substantiating a charge of murder (y). On the other hand, in frequent instances, attempts have been made by those who have really been guilty of murder, to perpetrate it in such a manner as to induce a belief that the party was *felo de se*. It is well for the security of society that such an attempt seldom succeeds, so difficult is it to substitute artifice and fiction for nature and truth (z).

Where the circumstances are natural and real, and have not been *fabricated* with a view to evidence, they must necessarily correspond and agree with each other, for they did really so co-exist; and therefore, if any one circumstance which is essential to the case attempted to be established be wholly inconsistent and irreconcilable with such other circumstances as are known, or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true (a).

* 960 The question, whether a person has died a natural death, as from apoplexy, or a violent one from strangulation; whether the death of a body found immersed in water has been occasioned by drowning, or by force and violence previous to the immersion (b); whether the * drowning was voluntary, or the result of force; whether the wounds inflicted upon the body were inflicted before or after death, are questions usually to be decided by medical skill.

It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted on the one hand from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict, notwithstanding strong, but merely circumstantial, evidence against him.

Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, de-

(y) See the trial of *Spencer Couper*, a barrister, for the alleged murder of Mrs. Stout, at Hertford, during the previous assizes.

(z) *Vide supra*, Part I. p. 20. Part III.

(a) *Vide supra*, Part III.

(b) See *Couper's case*, 5 St. Tr.

cisive as to the cause of the death ; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is therefore, in all cases, expedient that all the accompanying facts should be observed and noted with the greatest accuracy : such as the position of the body, the state of the dress, marks of blood, or other indications of violence ; and, in cases of strangulation, the situation of the rope, the position of the knot ; and also the situation of any instrument of violence, or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned.

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agency.

Where it has been clearly established that the crime of wilful murder has been perpetrated, the important fact, whether the prisoner was the guilty agent, is of course for the consideration of the Jury, under all the circumstances of the case. Circumstantial evidence in this, as in other criminal cases, relates principally

1st, To the probable *motive* which might have urged the prisoner to commit so heinous a crime ; for however strongly other circumstances may weigh against the prisoner, it is but reasonable, in a case of doubt, to * expect that some * motive , and that a strong one, should be assigned as his inducement to commit an act from which our nature is abhorrent, and the consequence of which is usually so fatal to the criminal.

Presumptive
evidence.

* 961

2dly. The means and opportunity which he possessed for the perpetrating the offence (b).

3dly. His conduct in seeking for opportunities to commit the offence, or in afterwards using means and precautions to avert suspicion and inquiry, and to remove material evidence (c).

The case cited by Ld. Coke and Ld. Hale, and which has already been adverted to (d), is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, where it is not satisfactorily proved by other circumstances, that a murder has been committed ; and even where satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced, and injudicious person, ignorant of the nature of evidence, and unconscious that truth and sincerity of innocence will be his best and surest protection,

(a) *Supra*, Part I. p. 29, & Part III.

(b) *Supra*, Part III.

(c) *Supra*, Part III.

(d) *Supra*, Vol. I. p. 33. 2 Hale, 200.

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and how greatly fraud and artifice, when detected, may operate to his prejudice, will often, in the hope of present relief, have recourse to artifice and misrepresentation.

4thly. Circumstances which are peculiar to the nature of the crime; such as the possession of poison, or of an instrument of violence corresponding with that which has been used to perpetrate the crime, stains of blood upon the dress, or other indications of violence.

* 962 Upon the general nature and effect of circumstantial evidence, some observations have been already made; and it would be inconsistent with the limits of * the present work to enlarge further upon the subject. It is essentially necessary to the security of mankind that Juries should convict, where they can do so safely and conscientiously, upon circumstantial evidence; and that it should be well known and understood that the secrecy, with which crimes are committed, will not secure impunity to the criminal. In acting, however, upon circumstantial evidence, the just and humane rule upon which Lord Hale laid so much stress (c), cannot be too often repeated: *Tutius semper est errare in acquietando quam in puniendo, ex parte misericordiae quam ex parte justitiae*.

Evidence by
the defendant.

It has been seen that the law infers malice from the act of killing, and that it is incumbent on the prisoner to prove those circumstances in his defence which justify, excuse or extenuate the act.

Justification.
Process of law.

1st. He may justify the act by proof that he acted in execution of the process of the law (d); that the death was occasioned by the resistance made by the deceased to the execution of a lawful authority (e). In such a case it is necessary to prove a lawful authority, and that the officer used legal means to enforce it (f), and that the death was unavoidably occasioned by the attempt to enforce the execution of the authority against the party who resisted it (g).

(c) 2 Hale, 290.

(d) Fost. 267. 4 Bl. Comm. 178. 1 Hale, 496. 502.

(e) Fost. 270.

(f) *Supra*, 810, & seq. and 950, & seq.

(g) It has been said that an officer was guilty of manslaughter because he had not first given back, as far as he could, before he killed the party, who had escaped out of custody in execution for a debt, and resisted being retaken (1 Roll. R. 189); but this case has since been disapproved of. Fost. 271. East's P. C. 307. In the case of resistance to officers of the customs and excise, see the stat. 9 Geo. II. c. 35, s. 35.

* If a party fly to avoid an arrest for a *felony* which has been committed, or where a dangerous wound has been given, or where an officer is armed with a lawful warrant to apprehend the party for felony, although no felony has been committed, and he cannot otherwise be taken, the killing him will be justifiable (*h*); but in the case of any misdemeanour short of felony, and in all civil cases, if the officer kill the party, who flies in order to avoid an arrest, he will be guilty of murder or manslaughter, according to the particular circumstances of the case (*i*).

The accused may also show in justification that he committed the act in self-defence. If *A.* manifestly intends to commit a felony on the property or person of *B.* by violence or surprise, *B.* is not obliged to retreat, but may pursue his adversary till he find himself out of danger, and if in the conflict *A.* happeneth to die, such killing is justifiable (*k*); but in the case of mutual conflict, the party, to excuse himself, must show that he retreated as far as he could before he gave the mortal stroke, and that he killed his adversary through mere necessity to avoid immediate death (*l*) (1).

Justification.
Self-defence.

2ndly. *In excuse.*—Proof that the death was not wilfully and intentionally occasioned by the prisoner will * not, it has been seen, enure as a *justification*, unless he can show that the death was an inevitable accident, occasioned by the doing of a lawful act, which he could not, by the exercise of usual and ordinary caution, have avoided (*m*).

Excuse.
* 964

3rdly. The prisoner may, in certain instances, *extenuate* his crime, and reduce it from murder to manslaughter, by

In extenuation.

(*h*) 1 Hale, 489, 490. 1 Haw. c. 28, s. 11. Fost. 271. The pursuit is not barely warrantable; it is what the law requires, and will punish the neglect of (see the case of the *Marquis de Guiscard*, Fost. 271.) *Semble*, the finding a bill of indictment by a grand jury for felony will warrant a private person in apprehending the party indicted (1 Hale, 489, 490. East's P. C. 300, 301). So officers of justice are justified in killing rioters in endeavouring to suppress and disperse a mob, (in case it cannot be otherwise suppressed,) both at common law and under the riot act. See 1 Hale, 53. 494, 495. East's P. C. 304. 1 Geo. I. stat. 2, c. 5. And so *semble* are private persons.

(*i*) Fost. 271. 1 Hale, 481.

(*k*) Fost. 273, 4. 1 Hale, 481. 484.

(*l*) Fost. 277.

(*m*) *Vide supra*, 953.

(1) [To justify a homicide on the ground of self-defence, it must clearly appear that it was a necessary act, in order to avoid death or some severe calamity. *The State v. Wells*, 1 Cox's Rep. 424.]

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extenuation.
Provocation.

In cases of slight and inferior provocation, much depends upon the nature of the return made, and the instrument used. Where a boy had been assaulted, and his father ran three quarters of a mile, and beat and killed the assailant, it was held to be but manslaughter; but this was so held (t) because he struck with a wand, or small cudgel, and not with a deadly weapon.

* 967 No trespass to land, or goods (1), or words of reproach, or provoking or insulting actions or gestures, short of an assault (u), are sufficient to free an homicide from the guilt of murder; and this rule governs all cases * where the prisoner uses a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm (x). But if on such a provocation by words or gestures, the prisoner strike with a stick, or other weapon not likely to kill, and unluckily, and against the intention of the party, death ensue, it will be but manslaughter (y) (2).

on the face with an iron patten, which drew a great deal of blood, upon which he struck her on the breast with the pommel of his sword, and afterwards pursued her and stabbed her in the back, and it was held to be but manslaughter. But *Ld. Holt* said, that a single box on the ear would not have been a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear. *Mr. J. Foster* observes upon this case, that the smart of the man's wound, and the effusion of blood, might possibly keep his indignation boiling to the moment of the fact.

(t) *Foster*, 294.

(u) *Brain's case*, *Hale*, 455. *Cro. Eliz.* 778. *Noy*, 171. *Kel.* 131. [*Pennsylvania v. Bell*, *Addison's Rep.* 163.]

(x) *Fost.* 290, 1, 2. 2 *Hale*, 456.

(y) *Fost.* 290. In *Brain's case*, 1 *Hale*, 455, it is stated that *Watts* came along by the shop of *Brain*, and distorted his mouth, and smiled at him.—*Brain* killed him; and held to be murder. But note, it does not appear how he killed him. See *Ld. Morley's case*, 1 *Hale*, 455. *Kel.* 55.

(1) [No man has a right to defend his property (except his dwelling-house) against a mere trespasser, by making use of a deadly weapon. *The State v. Zellers*. 2 *Halsted's Rep.* 220. *Commonwealth v. Drew & al.* 4 *Mass. Rep.* 391.]

(2) [The general rule is that words are not, but that blows are, a sufficient provocation to make a homicide manslaughter. *The State v. Tackett*, 1 *Hawks*, 210. But it exists in the very nature of slavery, that the relation between a white man and a slave is different from that between free persons; and therefore many acts will extenuate the homicide of a slave, which would not constitute a legal provocation, if done by a white person. *ibid.* And a person charged with the murder of a slave, may give in evidence that the deceased was turbulent, and that he was insolent and impudent to white persons in general. *ibid.*]

Where *A.* found *B.* trespassing on his land, and in the first transport of his passion beat and unluckily killed him, it was held to be manslaughter (*z*); but it would have been otherwise if he had betrayed malice by the instrument used, as if he had beaten the deceased with a hedge-stake (*a*).

Evidence in
extenuation.
Provocation.

In *Holloway's* case (*b*), where a servant caught a boy in his master's grounds stealing wood, and tied him to a horse's tail, by means of which he was killed, it was held to be murder. In all cases of slight provocation the general rule is, that if it can be collected from the weapon made use of, or from any other circumstance, that the party intended to kill, it will be murder (*c*).

* Although it be a general rule that no words of reproach, or provoking words or gestures, will reduce the offence from murder to manslaughter, yet if upon a *sudden quarrel*, and not upon *preconceived malice* (*y*), parties fight in the heat of blood upon equal terms, and no *undue advantage* be taken by the party who kills the other, the

* 968

(*z*) 1 Hale, 473. [*Commonwealth v. Drew & al.* 4 Mass. Rep. 391.]

(*a*) Fost. 291; *ibid.* 94. Even if a deadly weapon be used, but not in such a way as to show malice, it will be but manslaughter. *R. v. Rowland Phillips*, Cowp. 830.

(*b*) Palm. 548.

(*c*) Fost. 291. See the case of *R. v. Tranter & Reason*, Fost. 293, and 1 Str. 499; where the case seems to have been erroneously reported, and where it is represented that Mr. Lutterel having struck a sheriff's officer a slight blow with a cane, the officer and his companion fell upon him, stabbed him in nine places, and shot him whilst he lay on the ground entreating for mercy; and Mr. J. Foster intimates his opinion, in very strong terms, that the circumstances constitute wilful murder; but it appears that the facts were misreported. See also the case of *Willoughby & another*, East's P. C. 228, Bodmin Summ. Ass. 1791. Two soldiers were refused liquor by a publican at eleven o'clock at night; an hour and a half afterwards, when the door was opened to let out some company, one of them rushed in, and renewed his demand for beer, which was again refused, and on his refusing to depart, and offering to lay hold of the landlord, the latter at the same instant collared him, the one pushing, and the other pulling, towards the outer door, where, when the landlord came, he received a violent blow on the head with some sharp instrument from the other soldier, which occasioned his death. Buller, J. held it to be murder in both, notwithstanding the previous struggle; for the landlord did no more in attempting to put the soldier out at that time of night, and after the warning he had given, than he lawfully might, which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence that the prisoners came the second time with a deliberate intention to use personal violence. And see *Mason's* case, *supra*, 564, (*o*).

(*y*) *Supra*, 964.

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offence will be but manslaughter; and it matters not who gave the first blow (*d*). But if *B.* draw his sword and make a pass at *A.*, whose sword is undrawn, and then a contest ensue, in which *A.* is killed, it will be murder in *B.*, for he sought the blood of *A.*; but if *B.* had first drawn, and waited till *A.* had drawn, it would have been manslaughter (*e*). So where *A.* threw a bottle with great force at the head of *B.* and immediately drew his sword, and *B.* returned the bottle at the head of *A.* and wounded him, * and then *A.* stabbed *B.*, it was held to be murder; for *A.* in throwing the bottle manifested an intention to do some great mischief, and his drawing immediately showed that he intended to follow it up (*f*).

In every case of homicide upon provocation, if there be time for passion to subside, and reason to interpose, such homicide will amount to murder (*g*). Where, however, an interval has occurred between the quarrel and the combat, and there be a doubt whether the parties when they fought were still in heat of blood, it seems to be a question of fact rather than of law, whether they acted coolly and deliberately, or under the influence of passion. It seems in all cases of a defence of this nature, to be a question of fact, whether the prisoner yielded to sudden infirmity of temper occasioned by a provocation recognised by law, or by a malicious and deliberate artifice sought the provocation for the purpose of wounding or destroying (*h*).

Accessories,
&c.

If *A.* require *B.* to procure some one to murder *C.*, and *B.* procure *D.* to do it, *A.* is an accessory before the fact to *D.* (*i*). So it is a general rule, that if *A.* command *B.* to do an unlawful act, he is accessory to all that ensues upon the execution of that act (1). If he command *B.* to

(*d*) 1 Hale, 456. [See *Pennsylvania v. Robertson*, Addison's Rep. 248.]

(*e*) Fost. 295. 1 Haw. c. 31, s. 27.

(*f*) *Mawgridge's case*, Kel. 128, 9. Fost. 295, 6. *Oneby's case*, 2 Ld. Raym. 1485. 2 Str. 771.

(*g*) Fost. 296, & *supra*, 964. [See *Supra*, 964, note (1).]

(*h*) As where *A.* bade *B.* take a pin out of his sleeve with intent to take occasion to strike or wound (1 Hale, 457), or *A.* with the like intent offers *B.* a pint of ale to strike him. 1 Haw. c. 31, s. 24. *Mason's case*, *supra*.

(*i*) Fost. 125.

(1) [If one commit suicide in consequence of the counsel and persuasion of another, the latter is guilty of murder, even though the *felo de se* were under sentence of death. *Commonwealth v. Bowen*, 13 Mass. Rep. 356.]

beat C., and B. kills C., A. is accessory to the murder, for his command naturally tended to endanger the life of C. (k). So if A. command B. to * do an unlawful act, and B. executes the act in substance, although he deviates in particular circumstances, A. is accessory to the offence; as, for instance, if A. command B. to poison C., and he stab or shoot him (l). It is otherwise where B. departs from the command in *substance*; as where A. directs B. to beat C. with a small stick, and he beat him with a bludgeon, or wound him with a sword (m); for there was no command to do any thing which would probably occasion death. * 970

NEGLIGENCE. (a).

WHERE the plaintiff complains of an injury resulting from the negligence, or unskilful conduct, of the defendant in the performance of some work, or duty, undertaken by the latter, he must, whether the action be framed in contract or in *tort*, prove, 1st, The contract or undertaking on the ground of which the defendant acted (b). 2dly, The negligence of the defendant. 3dly, The loss which has resulted from it, according to the allegations in the declaration (c). The degree of negligence, which is essential to the action, arises much according to circumstances. According to the soundest principles of morality the very foundation of the law itself (d), "whoever undertakes another man's business, makes it his own, that * is, promises * 971 to employ upon it the same care, attention and diligence, that he would do if it were actually his own; for he knows that the business was committed to him with that expecta-

(k) 2 Haw. P. C. c. 29, s. 18. 4 Bl. Com. 37. 1 Hale, 435. So if A. direct B. to rob C., and B. kills C. in the attempt, for the death is the immediate effect of an act done in the execution of a felonious command. 2 Haw. c. 29, s. 18.

(l) 2 Haw. c. 29, s. 20. 4 Bl. Com. 37.

(m) 1 Hale, 436.

(a) As to the cases in which negligence in the performance of a contract, may be set up as a defence to an action for remuneration for services performed. *Vide supra*, 640, and *infra*, tit. *Work and Labour*.

(b) *Supra*, p. 81. 331. As to parties to the action, *vid. supra*, 334. 354. Variance from allegations, *supra*, 354. & *seq.* And *Hill v. Tucker*, 1 Taunt. 7, and tit. *Parties*.

(c) As to variance, *vide supra*, 83. 332. 346. 353, 4.

(d) Paley's Moral Philosophy, 144.

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IV.

Where the Defendant acted without reward.

tion, and with no more than this." This principle seems to govern all cases where one man acts *gratuitously* for another, whether the business in which he acts does or does not import particular skill and knowledge. If the party act *gratuitously*, and in a situation which does not import particular skill and experience, and act *bona fide* to the best of his ability, and with as much discretion as he would exercise in his own affairs, he is not liable to an action for any loss which ensues (e).

Thus, where a merchant, voluntarily, and without reward, undertook to enter a parcel of goods at the Custom-house for the plaintiff, together with a parcel of his own, and made the entry under a wrong denomination, in consequence of which, the goods were seized, it was held, that having acted *bona fide*, and to the best of his knowledge, he was not liable (f). But, it seems, that in such a case, if a ship-broker, or clerk in a custom-house, had undertaken to enter the goods, although gratuitously, such a mistake in making the entry would have amounted to gross negligence, since his situation and employment would then have necessarily implied a complete degree of knowledge in making such entries (g).

- * 972 * Although in the preceding cases each of the agents acted gratuitously, the former was not liable, because he acted to the best of his ability. which was all that he engaged to do, the other impliedly undertook to exert a degree of skill and knowledge, which he failed to do.

Most then of the cases of this nature, if not all, resolve themselves into a question of understanding and compact. Lord Holt, in the case of *Coggs v. Bernard* (h), held, that

(e) See 1 H. B. 162. Ld. Loughborough says, "I agree with Sir W. Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is liable only for gross negligence, but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." [See 6 Mass. Rep. 258.]

(f) *Shiells v. Blackburn*, 1 H. B. 158.

(g) See Ld. Loughborough's observations, 1 H. B. 162. If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook, *gratis*, to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper medicines, to the best of his ability, such person is not liable.

(h) 2 Ld. Ray. 909.

the mandatory was liable, because in such a case a neglect is a *deceit* to the bailor: for when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of trust undertaken voluntarily will be a good ground of action.

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Where the defendant acted without reward.

Where a party receives a *reward* for the performance of certain acts, he is by law answerable for any degree of neglect on his part: the payment of the money may be considered as an insurance for the due performing of what he has undertaken (i).

Where the defendant undertook, &c. for reward.

And it seems, that in general, where a person professes himself to be of a certain business, trade, or * profession, and undertakes to perform an act which relates to his particular employment, an action lies for any injury resulting either from *want of skill* (k) in his business or profession, or from negligence or carelessness in his conduct (l). * 973

In some instances, as in the cases of carriers (m) and innkeepers (n), the undertaking results as a legal obligation incident to the character in which the defendant undertakes to act, and it is consequently sufficient to show that the plaintiff dealt with him in that character, without proof of any special undertaking or agreement.

(i) See the observations of Wilson, J. in *Shiells v. Blackburn*, 1 H. B. 161. He adds, that where the undertaking is gratuitous, and the party has acted *bona fide*, it is not consistent, either with the spirit or policy of the law, to render him liable in an action.

(k) See *Shiells v. Blackburne*, 1 H. B. 158. *Moore v. Mourgue*, Cowp. 480. Puff. lib. 5 c. 4. s. 3. As to actions against attornies, *vide supra*, 133. See also, tit. *Carriers*; and B. N. P. 73, where the general rule is laid down, that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie; as, if a farrier kill my horse by bad medicines, or refuse to shoe (*quare*), or prick him in the shoeing.

(l) *Seare v. Prentice*, 8 East, 348. Where it was held, that case would lie against a surgeon for want of skill as well as for negligence.

(m) *Supra*, 331.

(n) It has been held, that, though an Innkeeper refuse to take charge of goods till a future day, because his house is full of parcels, yet that he is still liable for the loss if the goods be stolen during the time while the plaintiff stops as a guest. *Bennett v. Mellor*, 5 T. R. 273. [See *Clute v. Wiggins*, 14 Johns. 175. *Sneider v. Geiss*, 1 Yeates, 34. *Quinton v. Courtney*, 1 Hayw. 40.]

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2ndly. The question of negligence is one of fact for the Jury (o).

* 974 In an action against a coach-owner for negligence, proof that the coach broke down, and that the plaintiff was greatly bruised, is *prima facie* evidence that the injury arose from the unskillfulness of the driver, or the insufficiency of the coach (p).

Negligence.
Proof of negli-
gence.

Of Damage.

3rdly. As to the proof of the damage resulting to the plaintiff, see the titles *Assumpsit*, &c. (q).

NOTICE.

Notice to pro-
duce a notice,
when unneces-
sary.

Extent of this
rule.

ALTHOUGH it be a general rule that secondary evidence shall not be admitted as to the contents of any written document in the possession of the adversary, unless notice has been given to produce it, yet notice to produce the latter notice is unnecessary, for the obvious reason, that if it were, the same necessity would extend to every successive notice *ad infinitum*. Doubts have sometimes occurred at *Nisi Prius* upon the question, to what notices the exception extends (r), and whether it applies to notices in general, such as notices of the dishonour of bills of exchange, &c. In principle, it seems to be clear that the exception is limited to the case of a notice to *produce some other document* for the purpose of evidence in the cause; all other cases of notice are within the general rule, but not within the exception. The particular contents of a notice to quit may be as

(o) See the Case of *Moore v. Mourgue*, Cowp. 479, where, in an action by a merchant against his agent, for negligence in not insuring goods, Lord Mansfield directed the jury generally, that if they thought there was gross negligence, or that the defendant had acted *mala fide*, they should find for the plaintiff; if, on the contrary, they were of opinion that he had acted *bona fide*, and to the best of his judgment, then they should find for the defendant. And see *Reece v. Rigby*, 4 B. & A. 202, where it was left by Abbott, L. C. J. as a question of fact for the jury, whether the defendant, an attorney, had used reasonable care in the conduct of a cause. In the case of *Russell v. Hankey*, 6 T. R. 12, which was an action against a banker, the defendant having received bills from correspondents in the country, to whom they had been indorsed, had given them up to the acceptor, on receiving cheques for the amount, and Ld. Kenyon nonsuited the plaintiff. The Court afterwards refused a rule *nisi* to set aside the nonsuit. See further as to proof of the defendant's breach of undertaking, *supra*, 126. And see 3 Taunt. 117.

(p) *Christie v. Griggs*, 2 Camp. 79.

(q) And see also tit. *Case*, p. 359.

(r) Vide *supra*, 261.

* essential to the cause as those of any other document, and it may therefore be as material to require the best evidence in that case, as in any other. Such a document is essentially distinguishable from a mere formal notice to produce an instrument in evidence, its contents create or vary the rights of the litigant parties; it is part of the *res gestæ*; and the objection which excludes the necessity of proving a notice to produce a notice, namely, that an infinite series of such notices would be equally necessary, is wholly inapplicable, the nature and object of the two documents being entirely different (v).

Notice to produce a notice, when necessary.

In an action against the surety (s), on an indemnity bond conditioned to pay to the plaintiffs what should be due from the principal, within six months after notice, Lord Ellenborough held, that in order to let the plaintiff into proof of a written notice to the defendant, of the balance due, the usual preparatory proof of notice to produce the document was necessary, for the notice to the surety to pay the money was not a mere formal notice, but a statement of what was due (t). The same principle seems to apply equally to notices of the dishonour of bills of exchange, notices to quit (u), and all other notices which are part of the *res gestæ*, upon the contents of which the legal rights and situation of the litigant parties materially and essentially depend (x).

(v) Where a great number of impressions are printed at the same time, they are in the nature of duplicate originals. See *R. v. Watson*, 2 Starkie's C. 140, where it was held that a number of copies of a placard having been printed by order of the prisoner, who had taken away twenty-five of them from the printers, one of the remainder might be read without giving notice to the prisoner to produce the twenty-five. And see *R. v. Pearce*, Peake's C. 75. *Ante*, 850.

A recital in a deed is constructive notice of the contents to a party. *Prosser v. Watts*, 6 Madd. 59. But notice of the contents of a deed cannot be inferred from the mere fact that the witness attested the execution of the deed by a surety. *Reed v. Williams*, 5 Taunt. 257.

(s) *Grove & another v. Ware*, 2 Starkie's C. 174.

(t) In *Langdon v. Hulls*, 5 Esp. C. 157; and *Shaw v. Markham*, Peake's C. 165, notice to produce the letter containing notice of the dishonour of a bill was held to be necessary; in *Ackland v. Pearce*, 2 Camp. 601, the proof of the notice to produce was held to be unnecessary; so in *Roberts v. Bradshaw*, 1 Starkie's C. 28. [See *Supra*, p. 261, note (1).]

(u) *Vide supra*, p. 528.

(x) And, as it seems, the same principle also applies to notices of action to justices and others required by particular statutes. It is essential that the courts should see that the requisitions of the

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How proved.

* The opinion of the judges was lately announced, that a written copy of a letter, giving notice of the dishonour of a bill of exchange, and made at the same time, was sufficient, without proof of notice to produce the original (y).

It seems to be sufficient in all cases to prove the service of a duplicate notice (z). Notice to produce a document may be served, as has been seen, either on the adverse party, or his attorney (a) in criminal as well as civil proceedings (b). Service at the dwelling-house is sufficient, unless some statute requires personal service (c). Some instances of presumptive evidence of service have already been referred to (d). Evidence of a notice by parol is usually sufficient (e).

Title of.

The notice will be insufficient if it be intitled in a wrong cause (f). In an action by the plaintiffs A. and B., assignees of C. (a bankrupt) v. E., a notice to produce a document was intitled A. and B. assignees of C. and D. v. E. and this was held to be * insufficient, although A. and B. were in fact the assignees of C. and D. under a joint commission (o).

particular statute have been complied with, and this is best proved by means of the notice itself, or by proof of a duplicate original.

(y) *Kine v. Beaumont*, 3 B. & B. 288.

(z) *Jory v. Orchard*, 2 B. & P. 41. *Gottlieb v. Danvers*, 2 Esp. C. 455. *Anderson v. May*, 2 B. & P. 237. *Philipson v. Chase*, 2 Camp. 110. *Supra*, Vol. I. p. 359; and Vol. II. p. 132. And (*semble*) there is no difference between a duplicate original and a copy made at the time. *Kine v. Beaumont*, 3 B. & B. 288.

(a) *Supra*, Vol. I. p. 359. *Attorney General v. Le Merchant*, 2 T. R. 201. n. *Cates v. Winter*, 3 T. R. 306; *Peake's Ev.* 115. Where there is an agent in town, notices in the course of the cause ought to be given to him, and not to the attorney in the country, per Buller, J. *Griffiths v. Williams*, 1 T. R. 711; and see *Hayes v. Perkins*, 3 East, 568. As in the case of executing a writ of inquiry. *ibid.*

(b) *Ibid.*

(c) Per Mansfield, C. J. *Waters v. Taylor*, Westm. June 24, 1813. *Logan v. Houlditch*, 1 Esp. C. 22.

(d) See the case of *Champneys v. Peck*, *supra*, 132. 260, 1, 2.

(e) *Supra*, Vol. I. p. 359. *R. v. Justices of Surrey*, 5 B. & A. 439. But the properest course is to serve a written notice; and Gould, J. at Exeter, held a parol notice to produce a deed to be insufficient.

(f) 1 Starkie's C. 61.

(o) *Harvey & others v. Morgan*, 2 Starkie's C. 17, Cor. Ld. Ellenborough, and afterwards by the court of K. B. on motion for a new trial, on the ground that the notice was sufficient, and that secondary evidence ought to have been admitted.

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It has already been seen that notice to the adversary to produce a document is not sufficient to warrant parol evidence of the contents, unless his possession of the document be proved (*g*).

Proof of possession, &c.

In an action to recover penalties for usury, the plaintiff proved notice to the defendant to produce the draft on a banker, by means of which the money had been paid, Buller, J. held this to be insufficient, in the absence of proof that the defendant had received the draft again into his hands from the banker (*h*).

Where a document is produced in consequence of notice, and part is read, the party who produces it is, in general, entitled to have the whole read (*i*); but where notice was given to produce a letter which expressed that it covered several enclosures, but without referring to them particularly, it was held that the party producing the letter was not entitled to have the enclosures read (*k*).

It is a rule of law, founded on the first principles of natural justice, that no judgment shall be pronounced against one who has not had notice given of the proceedings, and an opportunity to defend himself.

General principle as to notice of legal proceedings.

Where trustees under a turnpike act had power to turn roads through private grounds, and if they could not agree with the proprietors to summon a jury, to inquire of damages, an inquisition under the act was set aside, because it did not appear on the face of the proceedings that any notice had been given to the owners of the land (*l*).

Notice to an agent, when sufficient.

Where it is necessary to prove notice to a man, in a * matter which concerns his trade or business, it is usually * 978 sufficient to prove notice to his servant or agent (*m*). A notice of prior title to the attorney is equivalent to notice to the client himself (*n*), provided it arise out of the same transaction (*o*).

(*g*) *Supra*, Vol. I. p. 357.

(*h*) *Greenall v. Searl*, Hil. 27 G. 3. MS.

(*i*) Vol. I. p. 291, 2. 369. Vol. II. p. 48.

(*k*) *Johnson v. Gilson*, 4 Esp. C. 21. And where a shop-book was produced, in pursuance of notice, it was held that the party who produced it was not entitled to read other entries in the book, which had no reference to those which had been read by the adversary.

(*l*) *R. v. Bagshaw*, 7 T. R. 363. And see *R. v. Mayor of Liverpool*, 4 Burr. 2244, and *supra*, 807, note (*b*), and Vol. I. p. 214.

(*m*) *Supra*, 693, (*l*); and see tit. *Carriers*.

(*n*) *Merry v. Abney*, 1 Ch. C. 38. *Brotherton v. Hatt*, 2 Vernon, 574. 609. 1 Bro. C. C. 244.

(*o*) Fitzg. 207. 3 Atk. 291. Bac. Ab. Ev. A. 2.

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As to notice of disputing the steps of bankruptcy, in an action by the assignees of a bankrupt (*p*), notice of an act of bankruptcy (*q*), of insolvency (*r*), of the dishonour of a bill of exchange (*s*), notice to prove value given for a bill of exchange (*t*), of non-responsibility by carriers (*u*), of a distress by a landlord (*x*), of notice to quit by a landlord (*y*), of disputing the value, &c. in an action for goods sold and delivered (*z*), of a robbery, &c. in an action against the hundred (*a*), by the husband, not to trust the wife (*b*), notice in actions against justices (*c*), constables, &c. (*d*), in actions against revenue officers, &c. (*e*), of a dissolution of partnership (*f*), of abandonment in an action on a policy of insurance (*g*), in actions for malicious trespasses (*h*).—See those titles respectively.

(*p*) *Supra*, 163.

(*q*) *Supra*, 176. The issuing a commission is not in itself notice of bankruptcy; and therefore a payment after a commission has been issued, but without actual knowledge of the bankruptcy, is protected by the stat. 1 J. 1. c. 15, s. 14. *Sowerby v. Brooks*, in error, 4 B. & A. 523; [Coote on Mortgages, 430.] And see the st. 56 G. 3. c. 137, which extends the provisions of the stat. 1 J. 1. c. 15, to the delivery of goods, wares, &c. to the bankrupt, before such time as the party shall understand or know, &c.

(*r*) *Supra*, 177. 179. 197.

(*s*) *Supra*, 257. 261. 269.

(*t*) *Supra*, 253. 279.

(*u*) *Supra*, 337.

(*x*) *Supra*, 499.

(*y*) *Supra*, 525.

(*z*) *Supra*, 64.

(*a*) *Supra*, 675.

(*b*) *Supra*, 694.

(*c*) *Supra*, 792.

(*d*) *Supra*, 819.

(*e*) *Infra*, tit. *Officers*.

(*f*) *Infra*, tit. *Partners*.

(*g*) *Infra*, tit. *Policy*.

(*h*) *Infra*, tit. *Trespass*.

